

**A critical analysis of the legal relationship between the EC and the
WTO
in the area of agriculture.**

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Bibliography

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Maria O'Neill

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ABSTRACT OF THESIS

Name of Candidate: Maria Catherine O'Neill

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Title of Thesis: A critical analysis of the legal relationship between the EC and the WTO in the area of agriculture.

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This thesis focuses on the evolving legal dynamic between the European Community and the World Trade Organisation in the area of Agriculture.

The WTO's Agreement on Agriculture does not exist in isolation, but interacts with many of the balance of the Annex 1A agreements, which are attached to the Agreement Establishing the WTO. In addition the General Agreement on Trade in Services (GATS) and the agreement on Trade Related aspects of Intellectual Property Rights (TRIPs) both have their part to play in the global trade of agricultural commodities. The provisions of these agreements and their associated dispute settlement rulings are having an increasingly profound impact on the EC's Common Agricultural Policy, and its allied policy areas, such as the Common Customs Policy, its Generalised System of Preferences, and its Development Policy relationships, in particular with the Afro-Caribbean-Pacific countries. The nexus between these two evolving legal jurisdictions, is mediated through the EC's Common Commercial Policy, with this relationship having been subject of its own line of jurisprudence at the ECJ. Each of these factors in the dynamic between these two levels of governance on the legal framework dealing with agriculture are examined in turn, with the relationship to date being critically analysed, with potential developments for the future being forecasted.

The reaction of the EC to this external force, with the adoption of the concept of the multifunctionality of EC agriculture, which has been added to an equally legally challenging concept of sustainability, has resulted in the development of Pillar II of the CAP, which presages the emergence of a new EC Rural Policy. A number of the emerging ideas from within the EC which might be applied to such a new EC Rural Policy are also examined. To the extent that the

synergy between these two legal systems dealing with agriculture are affected by allied policy considerations, such as health and consumer affairs, competition law and environmental standards, these other areas are also discussed.

The thesis has as its focus agricultural commodities generally, which are the subject matter of the WTO Agreement on Agriculture, (therein classified as HS 1-24, less fish and fish products), but where the thesis does focus on specific commodities, these are agricultural commodities of the temperate regions of the EC.

Abbreviations

AASM – Association of African States and Madagascar

AB – Appellate Body

ACP – Afro-Caribbean Pacific

AG – Advocate General

AMS – Aggregate Measures of Support

ASEAN – Association of South East Asian Nations

BTN - Brussels Tariff Nomenclature

CACM – Central American Common Market

CAP – Common Agricultural Policy

CCC- Common Customs Code

CFI – Court of First Instance

CFSP – Common Foreign and Security Policy

COEGA – General Committee for Agricultural Co-operation in the European Union

COREPER – Committee of Permanent Representatives

COPA – Committee of Agricultural Organisations in the European Union

CTE – WTO Committee on Trade and Environment

DG – Directorate General (of the European Commission)

DSB – Dispute Settlement Body

DSU – Dispute Settlement Understanding

EAFRD – European Agricultural fund for Rural Development

EAFG – European Agricultural Fund for Guarantee

EAGGF – European Agriculture Guarantee and Guidance Fund

EBAF – European Board of Agriculture and Food

EC – European Community

ECJ – European Court of Justice
ECSC – European Coal and Steel Community
ECU – European Currency Unit
EEA – European Economic Area
EEC – European Economic Community
EFSA – European Food Safety Authority
EIB – European Investment Bank
EMEA – Euro-Mediterranean Economic Area
EPA – European Patent Convention
EPO – European Patent Office
EQUAL – A transnational co-operation to fight against discrimination and inequality in access to work initiative: EC
ERDF – European Regional Development Fund
ERM – Exchange Rate Mechanism
ESF – European Social Fund
EU – European Union
EU ETS – European Union Emissions Trading Scheme

FAO – Food and Agriculture Organisation
FIFG – Financial Instrument for Fisheries Guidance

G9 – group of 9 countries
G10 – group of 10 countries
GAEC – Good Agricultural and Environmental Condition
GATS – General Agreement on Trade in Services
GATT – General Agreement on Tariffs and Trade
GM – Genetically Modified
GMO – Genetically Modified Organism
GSP – Generalised System of Preferences

HS – Harmonised Commodity Description and Coding System

ICCICA – Interim Co-ordinating Committee for International Commodity Arrangements

ICJ – International Court of Justice

ILO – International Labour Organisation

IMF – International Monetary Fund

INTERREG – A cross-border, transitional and inter-regional cooperation initiative: EC

IPP – Integrated Product Policy

IPPC – International Plant Protection Convention

ISPA – Instrument for Structural Policies for pre-Accession

ITO – International Trade Organisation

ITTO – International Tropical Timber Organisation

LDC – Least Developed Countries

LEADER – An initiative dealing with rural development by local action groups: EC

MCA – Monetary Compensation Amounts

MEA – Multilateral Environment Agreement

MFN – Most Favoured Nation

NAFTA – North Atlantic Free Trade Association

NCPI – New Commercial Policy Instrument

NGO – Non Governmental Organisation

NT – National Treatment

NV N&I – Non Violation Nullification & Impairment

OECD – Organisation for Economic Co-operation and Development

OIE – International Office of Epizootics

OTC – Organisation for Trade Co-operation

PDO – Protected Designation of Origin

PGI- Protected Geographical Indications

PHARE – A pre-accession funding initiative for pre EU accession countries: EC

PhD – Doctorate in Philosophy

PJCCM – Police and Judicial Co-operation in Criminal Matters

PPA – Protocol of Provisional Application

RIA – Regional Integration Association

SCM – Subsidies and Countervailing Measures

SFP – Single Farm Payment

SPA – Special Area of Conservation

SPS – Sanitary and Phytosanitary measures

SPSMs – Sanitary and phytosanitary Measures

TBR- Trade Barrier Regulation

TPRM – Trade Policy Review Mechanism

TRAMS – Trade Related Anti-Trust Measures

TRIPs- Trade Related aspects of Intellectual Property

TSG – Traditional Speciality Guaranteed

UA – Unit of Account

UN – United Nations

UNCTAD – United Nations Conference on Trade and Development

UNEP – United Nations Environmental Programme

UPOV – International Convention for the Protection of New Varieties of Plants

URBAN – A regeneration of urban areas in crisis initiative: EC

US – United States of America

USTR – United States Trade Representative

VAT – Value Added Tax

VER – Voluntary Export Restraint

WHO – World Health Organisation

WTO – World Trade Organisation

Chapter 1 Introduction

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1. Introduction

The definition of Agriculture being used for the purposes of this thesis is that used in the WTO Agreement on Agriculture, Annex 1. In line with Annex 1,1.i, issues pertaining to fish and fish products will therefore not form part of the discussions in this thesis.

The issue of Agriculture, and the legal basis for controlling the rural use of agriculture, merits in depth examination. Agriculture is increasingly becoming a bone of contention in international trade disputes, as evidenced by the fact that the whole of the General Agreement on Tariffs and Trade under the Uruguay round of negotiations was held up pending the resolution of the Agricultural trading issues between the three main negotiating parties at the international

level, the EC, the USA and the Cairns group,¹ which resolution was eventually reached at Blair House in November 1992. Conflicting issues of feeding an increasing global population, at a reasonable price, while maintaining our respective bio-diversities, local ecosystems and rural populations, are continuing issues of debate. Differences in social priorities in different areas around the world will influence the development of international debates, in this increasingly globalised world, and it is for this purpose that I intend to examine the legal structure of Agricultural policy at two levels, and to examine the interaction between the two. I have chosen the EC agricultural policy and the WTO agricultural provisions for this purpose.

The European Economic Community (EEC), now known as the European Community (EC), (founded pursuant to the Treaty of Rome 1957²) is a supranational entity, considered by lawyers to be *sui generis*,³ which is given legal status by Article 281.⁴ Member States' competence to act has, to the extent set out in the EC Treaty, as amended, been transferred to the EC,⁵ with European law being supreme to conflicting national law.⁶ Individuals have a right of recourse to their national courts in order to enforce European law against fellow citizens or their own governments.⁷ The EC Treaty also involved the signing over by the member states to the supranational organisation the exclusive right to

¹ 1. Argentina, 2. Australia, 3. Brazil, 4. Canada, 5. Chile, 6. Colombia, 7. Fiji, 8. Hungary, 9. Indonesia, 10. Malaysia, 11. New Zealand, 12. The Philippines, 13. Thailand, 14. Uruguay.

² Otherwise known as the EC (formerly the EEC) Treaty. This treaty has been amended a number of times by amending treaties. In this thesis I refer to the post Amsterdam version of the EC Treaty, unless otherwise specified.

³ Weatherill S., "The Constitutional Court", Chapter 6 in *Law and Integration in the European Union*, 1995, at page 185.

⁴ Article 210 EC, pre Amsterdam.

⁵ For a discussion of this point in the context of the EC's legal relationship with the WTO see further chapter 6.

⁶ See the line of ECJ case law commencing with Case 6/64, *Costa v. ENEL*, [1964] ECR 405, [1966] CMLR 111, where the principle was recognised, and subsequently developed in Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125 (national constitutional law), to include the protection of recognised rights under EC law, and also potential rights not yet ruled upon by the ECJ; Case C-213/89, *R v. Secretary of State for Transport, ex parte Factortame Ltd and others* [1990] ECR I-2433.

⁷ All national courts and tribunals are obliged to apply European Community law; Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal* [1978] ECR 629.

determine Agricultural Policy⁸ for the EC member states,⁹ with the agricultural policy of what is currently the 25 member states of the European Union operating a unified agricultural policy, the Common Agricultural Policy, or CAP. Each of the member states of the EC, together with the EC, have all signed up to the global trading agreements, GATT 1994,¹⁰ GATS¹¹ and TRIPS.¹² These are enforced through the World Trade Organisation (WTO), which also operates the WTO Agreement on Agriculture and its allied Agreement on Sanitary and Phytosanitary Matters (SPS Agreement). The CAP of the EC and the WTO Agriculture agreement both have different histories, different emphases, and differences in political underpinnings. Given the differing legal frameworks and dynamics within the EC and the WTO, together with the differing emphasis in policy approach at the two levels, the historical and continuing tensions in the area of agriculture are likely to continue into the future.

The concept of sovereignty has been developed to cover the concept of the right to govern over a territory of land. The concept of state that we have been working with for a number of centuries evolved from the Peace of Westphalia¹³ from which the principles of "sovereignty and autonomy" evolved.¹⁴ The "Westphalian" model of states, and the resulting international order is considered by some academics to have lasted from 1648 to the end of the second world war, 1945, with the founding of the United Nations (UN). The founding of the UN, under the United Nations Charter in 1945, is seen as the birth of the globalisation movement, which continues apace. Low and Gleeson are of the opinion that "the United Nations system marks a transition from a world of national sovereign states, settling their differences by force, to one marked increasingly international and in some instances negotiated global

⁸ For a discussion of this point in the context of the EC's agricultural policy see chapter 6.

⁹ See Articles 32 to 38 EC, (ex. Articles 38 to 46 EC).

¹⁰ The General Agreement in Tariffs and Trade 1994, which was preceded by GATT 1947.

¹¹ General Agreement for Trade in Services.

¹² Trade related issues of Intellectual Property.

¹³ Which brought to an end the German phase of the Thirty Years War.

¹⁴ Low, Nicholas and Gleeson, Brendan; "Justice, Society and Nature an exploration of political ecology", Routledge 1998, at page 177.

regimes established for specific purposes with the consent of nations".¹⁵ A key question which they ask, which has a direct impact on the subject matter of this thesis is "whether this negotiated order is adequate to advance the ends of environmental and ecological justice, and, if not, what further institutional change is needed?"¹⁶ While the focus of this thesis is agricultural law rather than environmental law, the natural interaction between these two areas of law, increasingly evidenced under the EC's mid-term review of agriculture¹⁷ and espoused by the EC in the current Millennium round of negotiations at the WTO, in its advocacy of the multifunctionality of agriculture, is not so clearly reflected in the current, or even possibly, future, WTO Agreement on Agriculture. Added to these problems are the tensions that the interaction of two very different legal systems throw up, and the issue of the legal relationship between the EC and the WTO in the area of agriculture becomes a complex one. It is not proposed to examine the entirety of this relationship in depth in this thesis. What is proposed, however, is to examine the nexus of this relationship in depth, with an introduction being made to supporting or related issues.¹⁸ It should also be noted that the increasing impact of developing and less developing country concerns with regard to both the EC and the WTO regulatory framework in the area of agriculture is not being covered in this thesis.

Land is not seen as being just another commodity, even in this most consumerist of times. Land provides us with a place in which to live. It provides us with food and water to consume. It is also responsible for recycling waste products of human existence, and provides a place for wildlife and nature to exist. It is increasingly being used as a recreational asset in an increasingly urbanised society. The varying purposes for which we use land, both for the production of tradeable commodities, and for the production of non tradeable commodities, was referred to by Franz Fishler, the former EC Commissioner for

¹⁵ Ibid. at page 178.

¹⁶ Ibid. at page 178.

¹⁷ which is analysed in depth in chapter 8.

Agriculture and Rural Development, as being multifunctional.¹⁹ This multifunctionality of land is increasingly posing a problem in a changing and smaller world.²⁰ In addition to the EC concept of multifunctionality in the area of agriculture should be added the concept of “sustainability”, an international law concept which permeates all aspects of EC law. The definition of sustainability in common usage is that of the Brundt Land commission, which submitted that development, in order to be sustainable, should meet “the needs of the present without compromising the ability of future generations to meet their own needs”.²¹ This concept of sustainability is being promoted at UN level through the Rio Conference,²² which approved Agenda 21,²³ and the UN Commission of Sustainable Development.

Sustainability has been written into the EC treaty, at Article 2 EC, with environmental protection requirements being required to be integrated "into the definition and implementation of Community policies" by virtue of Article 6 EC. The concept of sustainability has also been written into WTO documentation, such as the preamble of the WTO agreement,²⁴ and the Ministerial Decision of the 14th April 1994²⁵ which provided that it was "allowing for the optimal use of the world's resources in accordance with the objective of sustainable development", while still seeking to preserve and protect “the environment and to enhance the means for doing so in a manner consistent with their respective

¹⁸ An introduction to the legal relationship between the EC and the WTO in these allied policy areas will be made in chapter 8.

¹⁹ See inter alia, European Commission Info - Paper "Contribution of the European Community on the Multifunctional Character of Agriculture", October 1999, available at http://ec.europa.eu/agriculture/external/wto/document/ip2_en.pdf, accessed on the 9/8/06, at page 1.

²⁰ OECD: Multifunctionality: Towards an Analytical Framework, 2001.

²¹ Policies to Enhance Sustainable Development; OECD 2001, quoting from WECD. 1987 World Commission on Environment and Development (WECD) (1987), *Our Common Future*, Oxford University Press, Oxford, UK

²² The Rio Conference on the Environment and Development (UNCED) in 1992.

²³ The UN Agenda for Sustainable Development in the 21st Century, available at <http://www.un.org/esa/sustdev/documents/agenda21/index.htm>

²⁴ which states that the "need to protect and preserve the environment, in a manner consistent with countries' needs and levels of economic development".

needs and concerns at different levels of economic development".²⁶ The current Doha agenda also provides that "sustainable development should be an overarching goal of the negotiation".²⁷ How the two levels of governance, the EC and the WTO, approach the issue of sustainability, and environmental standards in general, together with the compatibility of their approaches, also merits examination in this thesis.

While the theories underpinning international trade are undoubtedly driven by economics, when the commodity being traded is land (outwith the scope of this thesis), or the commodities which are grown on the land, then pure economic theory can fail to provide all of the answers. Daly and Cobb state that land is a very peculiar commodity, quoting from John Stuart Mill's *Principles of Political Economy*; "No man made the land. It is the original inheritance of the whole species. Its appropriation is wholly a question of general expediency".²⁸ The same may be said for land as the place of production of agricultural commodities. It may, therefore, no longer be expedient to treat either land or the harvest from the land as mere commodities, substitutable for capital, given the rate that mankind is exploiting its natural resources in this anthropocentric "western" society. Daly and Cobb are of the opinion that "economics as a discipline floats free from the physical world".²⁹ The EC's CAP is grappling with this complexity, and is making some early tentative steps to resolving the issue in its mid-term review provisions.³⁰ International trade in agricultural products is also a nexus where economics meets the physical world, and where the conflicting paradigms of trade, social sciences (of rural areas), and ecology must

²⁵ Decision of 14 April 1994, Ministers meeting on the occasion of signing the Final Act embodying the results of the Uruguay Round of multilateral Trade negotiations at Marrakech on 5 April 1994.

²⁶ Report of the WTO Committee on Trade and the Environment, Press/ TE 014, 14 November 1996, <http://www.wto.org>.

²⁷ Clarke, John; WTO: Now the Hard Work Really Begins, INTTLR 2002, 8(2), 39-52, at page 41.

²⁸ Daly, Herman E. & Cobb, John B. Jr "For the Common Good: redirecting the economy toward community, the environment, and a sustainable future"; Beacon Press, 1994, at page 105.

²⁹ Ibid. at page 99.

³⁰ of which more in chapter 8.

be reconciled. Quoting from Ely and Wehrwein,³¹ Daly and Cobb go on to say that "land policies must be based upon the operation of nature's laws as well as upon the economic drives of man".³² This also is the challenge for Agricultural lawyers, the CAP, and the WTO regulatory framework for agricultural commodities.

2. Introduction to Regionalism - with specific reference to the EC

Regionalism is very much a 20th century phenomenon, with the "erosion of the Westphalian nation-state system and the growth of interdependence and "globalisation".³³ While it is possible to find a definition of a region as "a limited number of states linked together by a geographical relationship and by a degree of mutual interdependence",³⁴ "new regionalism" is perceived by political scientists as being "still in search of theory".³⁵ Whatever its theoretical underpinnings, lawyers have to deal with regionalism as a reality, aware that the two global trends which form the backdrop of this thesis, regionalisation and globalisation, have an interdependent relationship. This reflexive relationship will be examined in depth in chapters 7 and 9.

Global regionalism has developed in waves, with the European Community, the European Coal and Steel community³⁶ and Euratom forming the first wave of regionalism. The success of what is now the European Union (EU) has encouraged the development of other regional organisations throughout the

³¹ Ely, Richard T., and Wehrwein, George S.; *Land economics*, Macmillan, 1940, more recently published by Madison, University of Wisconsin Press, 1964. (No ISBN number), at page 25.

³² *Op. cit.* footnote no. 28, at page 99.

³³ Hettne, Björn and Söderbaum, Fredrik, Göteborg University; "Theorizing the Rise of Regionness", conference paper presented at the CSGR 3rd Annual conference, After the Global Crises: What next for Regionalism, Scarman House, University of Warwick, 16-18 September 99, at page 4.

³⁴ *Ibid.* at page 10.

³⁵ *Ibid.* at page 19.

³⁶ Treaty Establishing the European Coal and Steel Community, Paris, April 18, 1951.

world, such as NAFTA³⁷ and ASEAN,³⁸ with the increasing confidence of states operating within regional organisations leading to “the trend to formal regionalisation” being “accelerated markedly”.³⁹ The success of such regional agreements has resulted in “approaches and techniques which have subsequently found application in the multilateral trading system”,⁴⁰ the larger and more ambitious World Trade Organisation in 1994.⁴¹

The EC is considered unique in the world legal order as few regional organisations have chosen to develop the supranational legal structure of the EC, or even to aim at the level of integration of policy developed at the EC/EU level. The EC policy areas are varied, to include trade⁴² and competition policy,⁴³ and the European Single Currency,⁴⁴ but also issues such as the now developing public health policy,⁴⁵ Economic and Social Cohesion,⁴⁶ Social Policy⁴⁷ and the Environment.⁴⁸ Any disputes arising are dealt with, either at a national level, by the national court structure, or at a community level, by the permanent European Court of Justice (ECJ),⁴⁹ or the Court of First Instance (CFI),⁵⁰ depending on the subject matter in question, or the nature of the litigation.

3. Introduction to Globalisation - with specific reference to the WTO

³⁷ The North Atlantic Free Trade Association in 1992.

³⁸ Association of Southeast Asian Nations, established in 1967.

³⁹ Regional Integration and the Multilateral Trading System: Synergy and Divergence, OECD, 1995, executive summary at page 13.

⁴⁰ Ibid at page 14.

⁴¹ Pursuant to the Uruguay Round of GATT.

⁴² Article 113 EC.

⁴³ Article 81 and 82 EC, (Article 85 and 86 EC pre Amsterdam).

⁴⁴ Articles 98 to 115 EC.

⁴⁵ Article 152 EC, (Article 129 EC pre Amsterdam).

⁴⁶ Articles 158 to 162 EC, (Articles 130a to 130d EC pre Amsterdam).

⁴⁷ Articles 136 to 145 EC, (Articles 117 to 122 EC pre Amsterdam).

⁴⁸ Articles 174 to 176 EC, (Articles 130r to Article 130t EC pre Amsterdam).

⁴⁹ Articles 220 to 245 EC, (Articles 164 to Articles 188 EC pre Amsterdam).

The concept of globalisation as it is commonly understood is the process where by the world is undergoing "ever intensifying interconnectedness and interdependence",⁵¹ so that for some theorists "it is becoming less relevant to speak of separate national economies, or separate national jurisdictions founded upon principles."⁵² This has resulted in the "spatial and temporal compression of the world",⁵³ but where it is not uniformly "compressed" but "greater or lesser distorted".⁵⁴ It should be noted that under the "realist" view of international relations theory, it is recognised that it is states that form the building blocks of both the EC and the WTO.⁵⁵ The current nature of globalisation is one where "western capitalism has become the world economy", at the expense of other models.⁵⁶

The inter world war period saw major changes in international economic conditions, with the "GATT and Bretton Woods institutions" being seen as "reactions to the experience" of those who had survived the turbulent years of the 1930s and the second world war,⁵⁷ which all led to the recognition of the need to change the legal structure in which international trading regimes were to operate. The principles of treaty law that had existed "during the preceding seven centuries" no longer seemed to operate, and the gold standard was discarded.⁵⁸ Some of the principles still inform legal provisions today, such as "the principles of reciprocity;

a) the principle of equal treatment between foreigners and nationals;

⁵⁰ See Article 237 EC, (Article 180 EC pre Amsterdam), for the limits of jurisdiction of the Court of First Instance.

⁵¹ Axford, Barrie; "The Global System; Economics, Politics and Culture", Polity Press, 1995, at page 27.

⁵² Ibid. at page 27.

⁵³ Hatsuse, Riuhei, Kolb University; "Historical Globalisation and Asian Implications", conference paper presented at the CSGR 3rd Annual Conference After the Global Crises: What next for Regionalism?, Scarman House, University of Warwick, 16 to 18 September 1999, at page 4.

⁵⁴ Ibid. at page 5.

⁵⁵ Op. cit. footnote no. 51, at page 27.

⁵⁶ Op. cit. footnote no. 53, at page 4.

⁵⁷ McIntyre, Owen; Commentary on Canny and Hunt by McIntyre in Parry, Geraint, Qureshi, Asif and Steiner, Hillel (eds), *The Legal and Moral Aspects of International Trade. Freedom and trade: Volume III*, Routledge, 1998, at page 53.

- b) the most-favoured-nation principle;
 - c) the open-door principle;
 - d) (as a counterpart to a), b) c), in highly developed forms of co-operation))
- the principle of preferential treatment
- e) the principle of fair treatment;
 - f) a minimum standard for those cases where the other principles cannot be applied."⁵⁹

One of the original legal documents in the field of globalisation is the Charter of Economic Rights and Duties of States 1974,⁶⁰ which was the "first attempt to lay down the legal principles of a new international economic order, ... with a declaration and a program of action, which contained "policy objectives rather than legal principles".⁶¹

The General Agreement on Tariffs and Trade owes its origins to the "series of bilateralisms of the 1930s" and the "Anglo-American wartime planning for peace" and "subsequent multilateral negotiations" of the mid 1940's.⁶² These gave rise to the Havana Charter, which was to set up the International Trade Organisation, of which the GATT agreement was to form part. This was to be complimented by agreements on "restrictive trade practices, investment, commodities and the like",⁶³ however these complimenting provisions did not come into effect due to the failure of the US Congress to ratify them, as GATT 1947 continued as a standalone agreement on a "provisional basis".⁶⁴ This situation was unfortunate as the Havana Charter had recognised the flaws of a market based on the principles of free trade only, and had contained "detailed

⁵⁸ van Themaat, Verloren; *The Changing Structure of International Economic Law*, Martinus Nijhoff Publishers, 1981, at page 69.

⁵⁹ Ibid. at page 16, quoting from G. Erler, *Grundprobleme des internationalen Wirtschaftsrechts* (Göttingen, 1956).

⁶⁰ Resolution GA of 12 Dec 1974 3281-xxix.

⁶¹ Op. cit. footnote no. 58, at page 69.

⁶² Hunt, John; *Perspectives on Liberalising International Trade*; Ch. 4 in Parry, Geraint, Qureshi, Asif and Steiner, Hillel (eds), *The Legal and Moral Aspects of International Trade. Freedom and trade: Volume III*, Routledge, 1998, at page 46.

⁶³ Ibid. at page 46.

⁶⁴ Ibid. at page 46.

stipulations" in order to control markets "to some extent by commodity agreements",⁶⁵ and to prevent the formation of international cartels.⁶⁶

GATT 1947 was developed over a number of multi-lateral rounds, culminating in the Uruguay round, which commenced with the Punta del Este declaration of September 1986, and closed with the signing of the final texts in Marrakech, Morocco in April 1994, which resulted, *inter alia*, in GATT 1994. This agreement entered into force on the 1st January 1995. Other matters dealt with in the Uruguay round, and which resulted in multi-lateral agreements included the General Agreement on Trade in Services (GATS), and the Agreement on Trade related Aspects of Intellectual Property Rights, (TRIPS), and the WTO Agreement on Agriculture. The Millennium round has recently reopened negotiations, pursuant to Article 20 GATT.⁶⁷ However, until a new agreement is concluded, which will be, from previous experience, after lengthy negotiations taking many years, GATT 1994 continues to be the key document for discussion. GATT 1994 expressly provides that it is "legally distinct" from GATT 1947.⁶⁸ It provides, in allied agreements, for the setting up of the World Trade Organisation, and its dispute resolution system.⁶⁹

The WTO operates a multi-lateral trading system "based on a non-intrusive, non-discriminatory, national treatment approach",⁷⁰ with member state governments being free to maintain "divergent national policies".⁷¹ GATT has been perceived as suffering from a lack of dynamism,⁷² particularly with regard to the national treatment of matters such as environmental and labour standards,

⁶⁵ Op. cit. footnote no. 58, at page 69.

⁶⁶ Ibid. at page 69.

⁶⁷ Article 20 of the GATT texts confirms that one year after the end of the implementation of the GATT 1995 negotiations are to restart on the next GATT/WTO agreement. The implementation period, as defined in Article 1(f) is the six year period commencing in the year 1995 except that, for the purposes of Article 13, it means the nine year period commencing in 1995.

⁶⁸ Abbott, Frederick M.; "Law and Policy of Regional Integration - The NAFTA and Western Hemispheric Integration in the World Trade Organization System", Kluwer 1995, at page 104.

⁶⁹ Article 19.

⁷⁰ Op. cit. footnote no. 39, at page 43.

⁷¹ Ibid. at page 46.

⁷² Ibid. at page 52.

which are recognised to create significant barriers to trade, and which will be relevant to the examination of Agricultural issues.

Of relevance to this thesis is the observation by the OECD⁷³ that GATT is under pressure to move from the traditional "trade" policy to a more intrusive "integration" model currently utilised by the EC.⁷⁴ This observation emphasises the differences between the legal structure of the two regimes, with the EC integration process, which covers a wider range of policy areas, requiring the transfer of competence to legislate to the supranational legal entity. This transfer of competence, where the national policies of member states are constantly open to challenge,⁷⁵ would be considered a bridge too far for many of the current members of the WTO. The problems of the governance processes of the EC would pale into insignificance in comparison with developments in this area by the WTO. Particular problems include the development of a definition of labour standards and environmental standards that would satisfy both advanced and developing countries. The possibility of the harmonisation of environmental measures which would produce viable regulations are seen to be "a long way off" at not only the WTO, but also the OECD and the UN.⁷⁶ This a particular problem for agricultural law.

4. The changing nature of the EC and the GATT/WTO legal jurisdictions

The legal documents which set up GATT 1947, GATT 1994, the WTO as an international organisation, and the EC⁷⁷ as an international legal entity,⁷⁸ are unquestionably international treaties between states, signed by states, and "ratified according to the internal constitutional arrangements of the Member

⁷³ Organisation for Economic Cooperation and Development.

⁷⁴ Op. cit. footnote no. 39, at page 46.

⁷⁵ Ibid. at page 48.

⁷⁶ Ibid. at page 43.

⁷⁷ The EU has not been granted legal personality by its treaties, and as Agriculture is dealt with by the EC pillar this thesis will focus on EC law.

Countries"⁷⁹ before coming into force. Perhaps the only exception to this statement is the fact that the EC, utilising the legal personality conferred upon it by Article 281 of its own founding treaty, the Treaty of Rome, as amended, and Article 310 EC, which gives it authority to "conclude with one or more States or international organisation" agreements, in pursuant of the EC's own objectives, signed up to the 1994 WTO and GATT agreements.⁸⁰ Leaving aside the accession of this regional integration organisation to the GATT/WTO structure in 1994, the construct of both the WTO and the EC both derive their original legitimacy from the principles of public international law. How the GATT/WTO legal structure, particularly after 1994, and the EC/EU legal structure developed subsequent to their inception merits, however, further examination.

The fact that the WTO legal structure is embedded in the public international law framework was recognised by the Appellate Body of the WTO, in the *US - Gasoline* case,⁸¹ when they "made it clear that the WTO Agreement could not be read in clinical isolation from public international law".⁸² Public international law was referred to by Hart as resembling "that simple form of social structure, consisting only of primary rules of obligations, which, when we find it among societies of individuals, we are accustomed to contrast with a developed legal system".⁸³ While the base structure of public international law may be problematic, this area of law has been developing apace since Hart was writing in 1961, given that the current international legal structure has been

⁷⁸ Article 281 EC.

⁷⁹ Howse, Robert; *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law*, in Weiler, J.H.H.(ed.) : *The Early Years of WTO Jurisprudence*, The EC, the WTO and the NAFTA, Towards a Common Law of International Trade, Oxford University Press, 2000, at page 37.

⁸⁰ This in itself posed a problem for the EC, and resulted in *Opinion 1/94* [1994] ECR 5264

⁸¹ *United States - Standards for Reformulated and Conventional Gasoline* (WT/DS2/ AB/R), adopted on 20 May 1996 (US-Gasoline), at page 17 of the ruling of the Appellate Body.

⁸² Marceau, Gabrielle; *Conflict of Norms and Conflicts of Jurisdictions; The Relationship between the WTO Agreement and MEAs and other Treaties*, *Journal of World Trade* 35 (6); 1081-1131, 2001, at page 1081.

⁸³ Hart, H.L.A.; *The Concept of Law*, Oxford University Press, 1961, at page 209.

dictated largely by the nature of today's global society,⁸⁴ and global society has been changing rapidly with the development in travel and telecommunication facilities. The international or global community is increasingly becoming interdependent "particularly in economic matters",⁸⁵ requiring the legal jurisdiction of public international law to facilitate the development of globalisation and regionalisation.

Having accepted the need to develop the legal jurisdiction of public international law, the sources of laws in this jurisdiction need to be examined, in order not to treat the WTO as an organisation operating in a legal vacuum. The Statute of the International Court of Justice provides an "authoritative statement of the sources of international law".⁸⁶ Article 38(1) of the ICJ statute provides that the Court is to apply "the following sources of law to any dispute submitted for settlement:

- i) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- ii) international custom, as evidence of a general practice accepted as law;
- iii) the general principles of law recognised by civilised nations; and
- iv) the judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law."⁸⁷

Primary sources of law are to be the international conventions, legal customs and general principles, with the judicial sources and legal writings to be regarded "as evidence of a material source of law in one of the other three forms".⁸⁸

Evidence of the use by the WTO of international law principles in its own case law can be seen in the Appellate Body's findings in the *US-Shrimp*⁸⁹ case. It

⁸⁴ MacLean, Robert M.: Public International Law, fourth edition, HTL Publications, 1995, at page 6.

⁸⁵ Ibid. at page 6.

⁸⁶ Ibid. at page 14.

⁸⁷ Ibid. at page 15.

⁸⁸ Ibid. at page 15.

was also recognised that the "interpretation of a treaty" is an evolving matter, as an un-amended "treaty can be affected by subsequent development in international law, including, arguably, new customs, general principles of law and Treaties".⁹⁰ The *Poultry*⁹¹ case went on to say that under Article 32 of the Vienna Convention⁹² a subsequent bi-lateral agreement could be used to interpret "the Scheduled obligations of the WTO Members in dispute".⁹³

The Vienna Convention on the Law of Treaties also provides interpretative tools in determining the relationship between the WTO treaties and other international law treaties, given the WTO finding in the *US-Gasoline* case⁹⁴ that WTO law is part of the public international law framework. All states are "expected to comply with their international obligations in good faith",⁹⁵ in compliance with Article 26 of the Vienna Convention.⁹⁶ This is of particular relevance to the contents of this particular thesis, given the possible interaction between the EC and WTO Agricultural provisions with the Multilateral Environmental Agreements (MEAs), which are currently coming to prominence in both legal and political circles, but also in the public conscience.⁹⁷

Three of the main principles in this area in determining a hierarchy between different international treaties are;

⁸⁹ Appellate Body in *US-Import prohibition of Certain Shrimp and Shrimp Products*, (*US-Shrimp*) WT/DS58/AB/R, adopted on 6 November 1998.

⁹⁰ Marceau, Gabrielle; Conflict of Norms and Conflicts of Jurisdictions; The Relationship between the WTO Agreement and MEAs and other Treaties, *Journal of World Trade* 35 (6); 1081-1131, 2001, at page 1081, commenting on the Appellate Body Report in *European Communities - Measures Affecting the Importation of Certain Poultry Products*, (*EC- Poultry*) WT/DS69/AB/R, adopted on 23 July 1998.

⁹¹ The Appellate Body Report in *European Communities - Measures Affecting the Importation of Certain Poultry Products*, (*EC- Poultry*) WT/DS69/AB/R, adopted on 23 July 1998 at point 83 of the ruling.

⁹² Vienna Convention on the Law of Treaties.

⁹³ Op. cit. footnote no. 82, at page 1088, at footnote no. 15.

⁹⁴ Op. cit. footnote no. 81, at page 17 of the ruling of the Appellate Body.

⁹⁵ Op. cit. footnote no. 82, at page 1081.

⁹⁶ Article 26 of the Vienna Conventions states that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

⁹⁷ This issue will be discussed further in later chapters, in particular chapter 8.

2. Treaty clauses, which provide cross references from one treaty to another, should be followed. This situation is regulated by Article 30.2 of the Vienna Convention,⁹⁸

2. The rule of "*lex posterior derogat priori*", whereby a later law will overrule all or part of a prior law with which it is in conflict,⁹⁹ and

3. *Lex specialis derogat generali*, which while this rule does not emanate from the Vienna convention, "it has been recognised and applied in a number of cases by the ICJ and is recognised by the doctrine."¹⁰⁰

Public international law interacts with the laws of member states depending on the internal constitutional order of each member state. Three theories apply, monism, dualism and harmonisation.¹⁰¹ Which of these legal orders the European Community operates *vis a vis* its relation to its international legal obligations will be examined in detail in chapter 6.

In contrast to the legal jurisdiction in which the WTO operates, the EC has managed, from its origins as regional integration association (RIA) founded on international treaties legitimised by the principles of public international law, to etch out for itself a totally new legal jurisdiction which is regarded by legal academics as being *sui generis*. The EC, or as it was then known, the EEC, was, like the WTO is now, recognised as having a "status.... subject, more or less, to public international law".¹⁰² There was no claim at the time for the EC to be "a self sufficient legal order, separate from the international agreements that bound the Member States."¹⁰³ That position changed thanks to the judicial activism of the European Court of Justice (ECJ), and with the complicity of the national courts of the member states.

⁹⁸ Article 30.2 of the Vienna Convention provides that "When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail".

⁹⁹ For the full detail on this rule, see Articles 30.3, 44, and 59.1 of the Vienna Convention, which should all be read together.

¹⁰⁰ Op. cit. footnote no. 82, at page 1092.

¹⁰¹ Op. cit. footnote no. 84, at page 33.

¹⁰² Eleftheriadis, Pavlos; "Aspects of European Constitutionalism"; ECR 1996 21(1), 32-42, at page 34.

¹⁰³ Ibid. at page 34.

Early case law of the ECJ¹⁰⁴ classified European law as a "new order of international law", separate from "both Member state law and international law",¹⁰⁵ however this reference to international law disappeared from later judgments.¹⁰⁶ The ECJ was faced with incomplete provisions in the Treaty of Rome dealing with the enforceability of EEC law, with the only "relevant treaty provision"¹⁰⁷ being the then Article 189 EEC. The ECJ developed, through a substantial body of law, the corpus of EC law, to include the fundamental principles of supremacy¹⁰⁸ and direct effect,¹⁰⁹ and the concept of a state being liable to an individual for the non-implementation of a community obligation.¹¹⁰ An important factor in the development of EC law is that "not only member states, but also individuals, have been recognised as directly subject to" EC law.¹¹¹ The ECJ's activist approach to EC law has been supported by "the courts"¹¹² of at least some member states".¹¹³

¹⁰⁴ of Case 26/62 *Van Gend en Loos* [1963] ECR 1, and Case 6/64 *Costa v. ENEL* [1964] ECR 585.

¹⁰⁵ Hartley, Trevor C.; *Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community*, *The American Journal of Comparative Law*, Vol. 34 1986, page 229, at page 233.

¹⁰⁶ Dagoglou, Prodroos D.; *The legal nature of the European Community*, in *Thirty years of Community Law*, European Communities, 1983, at page 34.

¹⁰⁷ *Op. cit.* footnote no. 105, at page 234.

¹⁰⁸ Case 6/64, *Costa v. ENEL*, [1964] ECR 405, [1966] CMLR 111, Case 11/70, *Internationale Handelsgesellschaft .v Einfuhr- und Vorratsstelle fur Getreide und Futtermittle* [1970] ECR 1125, Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal* [1978] ECR 629. Case C-213/89, *R v. Secretary of State for Transport, ex parte Factortame Ltd and others* [1990] ECR I-2433.

¹⁰⁹ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1, [1963] CMLR 105, Case 41/74, *Van Duyn v. Home Office* [1974] ECR 1337, Case 43/75 *Defrenne v. SABENA* [1976] ECR 455, Case 148/78, *Pubblico Ministero v. Ratti*, [1979] ECR 1629, [1980] 1 CMLR 96, Case 152/84 *Marshall v. Southampton and South West Hampshire Area Health Authority*, [1986] ECR 723.

¹¹⁰ Case C-6, 9/90, *Francovich and Others v. Italy*, [1991] ECR 5357, [1993] 3 CMLR 66.

¹¹¹ *Op. cit.* footnote no. 106, at page 41.

¹¹² *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle fur Getreide and Futtermittle*, 14 CMLR 540, (the Bundesverfassungsgericht 1974), *Frientine v. Ministero delle Finanze*, 14 CMLR 372, 401-402, (the Corte Costituzionale 1979), *R. v. Secretary of State for Transport, ex parte Factortame Ltd. et al.* (No. 2) [1991] 1 AC 603 and *Webb v. EMO Air Cargo (UK) Ltd* [1992] 4 All ER 929 (the UK courts).

¹¹³ *Op. cit.* footnote no. 105, at page 233.

The approach of the ECJ to viewing the EEC Treaty "as the highest source of law" was seen to be a "revolutionary change" to the European legal order.¹¹⁴ The direction of the case law is considered to be leading to the "making of a constitution for Europe".¹¹⁵ The body of EC law has now developed to the extent that its applicability and dynamic now operate "irrespective of the international agreements that founded the original Community".¹¹⁶ This new legal order now places the EC Treaty higher than the constitutions of the EC's Member States,¹¹⁷ thereby limiting the "sovereign rights" of EC Member States,¹¹⁸ to the extent that they continue to engage in the EC legal construct.

A consensus has yet to be achieved on the theorising of the "division of attributions"¹¹⁹ between the different levels of governance within the EC. One view is that of Laurence W. Gormley, who has classified the policies of the EC into two groups,¹²⁰ the principle aims and objectives of the EC,¹²¹ and "horizontal and flanking policies", which is any other policy referred to in the treaties.¹²² On the basis of this theory the horizontal or flanking policies are subject to the principle of subsidiarity,¹²³ which was introduced into the EC Treaty by the Maastricht Treaty in 1992.¹²⁴ A competing theory in this area is the occupied field theory. This theory operates on the basis of the "doctrine of pre-emption",¹²⁵ a concept of American origin, by which a legal area is "transformed

¹¹⁴ Op. cit. footnote no. 102, at page 35.

¹¹⁵ Mancini, G. Federico "The Making of a Constitution for Europe" (1989) 26 CMLRev. 596-614, at page 595 et seq.

¹¹⁶ Op. cit. footnote no. 102, at page 34.

¹¹⁷ Ibid. at page 34.

¹¹⁸ Op. cit. footnote no. 106, at page 40.

¹¹⁹ Constantinesco, Vlad "Who's Afraid of Subsidiarity?" YEL, 1991, 11, 33-35, at page 34.

¹²⁰ Gormley, Laurence W.; "Introduction to the Law of the European Communities" 3rd edition, 1998, at page 139 et seq.

¹²¹ 1. the free movement of goods, persons, services and capital, 2. the development of a Common Commercial Policy, and, 3. the development of European Competition Law, 4. the Common Agricultural Policy, 5. the Common Fishery Policy, and 6. the Transport Policy.

¹²² Op. cit. footnote no. 120, at page 1083 et seq.

¹²³ Discussed further in chapter 6.

¹²⁴ Otherwise known as the Treaty on European Union 1992.

¹²⁵ Burns, Tom: Subsidiarity: Principle and Practice, (1995) SLT 67, at page 69.

from concurrent jurisdiction to an area of exclusive competence for the federation".¹²⁶

Under the occupied field theory subsidiarity operates to "rationaliz[e] the management of public affairs"¹²⁷ between the different levels of governance within the EC. How exactly this theory of occupied field operates has led to differing views, with Toth holding the opinion that "where the Community has legislated in a particular area it acquired pre-emptive rights over the whole field".¹²⁸ Others¹²⁹ view the "exclusive powers of the Community" in a much more limited field, with pre-emption only operating "in a narrow way to allow the Community to acquire exclusive competence only in the specific area covered by the EC legislation",¹³⁰ and does not permit "the Community to lay claim over the whole area of policy".¹³¹ The concept of subsidiarity will be referred to in chapter 3, but analysed in depth in chapter 6.

5. The legal characteristics of the EC - Agricultural Provision

The CAP of the EC developed against the backdrop of the perception that "farmers had a special role in society", particularly given the scarcity of food during and after the Second World War.¹³² The six originating member states of the EEC were "far from self-sufficient in foodstuffs", and there was perceived to

¹²⁶ Ibid. at page 69.

¹²⁷ Op. cit. footnote no. 119, at page 36.

¹²⁸ Toth; "The Principle of Subsidiarity in the Maastricht Treaty" (1992) 29 CMLRev 1079.

¹²⁹ Weatherill, S.; "Beyond Preemption? Shared Competence and Constitutional change in the European Community", page 13 et seq. and Steiner J., "Subsidiarity under Maastricht", page 49 et seq. in O'Keefe and Twomey (eds.); *Legal Issues of the Maastricht Treaty*, Wiley Chancery Law (1994).

¹³⁰ Op. cit. footnote no. 125, at page 69.

¹³¹ Ibid. at page 70.

¹³² Moehler, Rolf; The role of agriculture in the economy and society; paper presented at the Seminar on Beliefs and Values Underlying Agricultural Policies, Lake Balaton, Hungary, September 19-23, 1996, <http://www.fao.org/docrep/W7440E/w7440e03.htm> at 25/1/02, at page 3.

be "no justification for the unilateral opening up of markets"¹³³ at that period in history. The Spaak report of April 1956 advocated special treatment for agriculture,¹³⁴ in comparison to other activities, on account of the need for food for human life, social stability of rural society, and the climatic and other natural factors which are outwith human control, which affected farming more than other economic activities.¹³⁵ In addition, regional disparities became another factor in dealing with the agricultural industry in a different manner to other economic activities.¹³⁶ The Stresa Conference of 1958 emphasised the social stability of rural areas and the need to reinforce the family farm.

The provisions of the Treaty of Rome derived from a compromise between existing national interests of the six member states.¹³⁷ The intention was to increase productivity, to stabilise markets and to guarantee a reasonable income for farmers, and reasonable prices for consumers.¹³⁸ It was strongly influenced by President Roosevelt's New Deal policy of the pre-war years.¹³⁹

The next stage in the development of the CAP was the Mansholt plan. Commissioner Mansholt, in March 1968 proposed the restructuring of the CAP in accordance with the policy paper "Agriculture 1980".¹⁴⁰ This plan "envisaged a reduction in the number of persons engaged in agriculture" through taking land

¹³³ Van Depoele, Laurent; The Common Agricultural Policy and the accession of Central and Eastern European Countries <http://www.zum.It/akof/kalbos/kal01.htm>, accessed 25.2.02, at page 1.

¹³⁴ Op. cit. footnote no. 132, at page 2.

¹³⁵ Ibid. at page 2.

¹³⁶ Ibid. at page 2.

¹³⁷ Voloanen, Risto; Secretary General of COPA and COGECA DIS (01) 04, Speech in AGRO-FOOD 2001; 7.2.2001; Tampere, Finland, reported at Attacking Global Barriers, Proceedings of the Leadership for Attacking Global Food and Agribusiness Barriers Conference 2001, March 12-14, 2001, Fairfax, Virginia, U.S.A., available at http://www.farmfoundation.org/projects/01-70_attacking_global_barriers.pdf, accessed on the 9/8/06, at page 111.

¹³⁸ Ibid. at page 111.

¹³⁹ Ibid. at page 111.

¹⁴⁰ "Mémorandum sur la réforme de l'agriculture dans la Communauté économique européenne", in *Bulletin de la Communauté économique européenne*. Mars 1969, No Supplément 3/69, pp. 19-48.

out of production, and there "creation of larger, more economic farms".¹⁴¹ This resulted in a long standing stand off between the Council and the Commission, which led, in 1971 to large scale protests organised by the farmers' organisations, COPA and COGECA, in Brussels, which lead to rioting, serious damage to property, and one death. The Mansholt plan was finally accepted in 1972,¹⁴² but this period epitomises the problems encountered when attempts are made to restructure or refocus the Common Agricultural Policy, in light of its originating basic tools.

The basic tools of the CAP included;

1. Target prices, being the prices that farmers should obtain on the open market;
2. Intervention Prices, being the prices at which intervention agencies would buy surplus produce. This was subsequently modified to include "quality standards and other regulations" concerning what would be bought into intervention,¹⁴³
3. Threshold prices at the frontier, being the lowest possible price that goods would be bought into the community, the difference between world market prices and threshold prices being adjusted by way of variable import levies imposed by the EEC;¹⁴⁴
4. Export subsidies, which would be payments made by the EEC on goods being sold out of the Community onto the world market, to allow for the differential between world prices, and the internal EEC price for that produce. In the unlikely event that world prices were higher than Community prices, then an export tax would be chargeable on the export of the agricultural produce.¹⁴⁵ The main principles of the Common Agricultural Policy became "the common market, financial solidarity and Community preference",¹⁴⁶ with supposedly uniform prices for commodities throughout the EC. The CAP has in more recent

¹⁴¹ McMahon J.: Law of the Common Agricultural Policy, Pearson Education Limited, 2000, at page 122.

¹⁴² Op. cit. footnote no. 137, at page 111.

¹⁴³ Op. cit. footnote no. 133, at page 2.

¹⁴⁴ Ibid. at page 2.

¹⁴⁵ Ibid. at page 2.

¹⁴⁶ Op. cit. footnote no. 132, at page 4.

years, particularly under the recent mid-term review,¹⁴⁷ been evolving into a two-pillar structure, with the second pillar contributing to a new European Rural Policy.

6. The legal characteristics of the WTO - Agricultural Provision

A complex historical and political background, which will be dealt with in detail in chapter 4, formed the backdrop to the development of GATT 1947, which eventually had little impact on agricultural commodities, leading to the need for a separate agreement dealing with agricultural commodities. It was, therefore, only at the Uruguay round, which led, *inter alia*, to the Agreement on Agriculture, that Agricultural issues came centre stage in GATT negotiations, with Agriculture being one of the more highly contentious issues in the negotiations that led to the agreement of the final treaty texts.

The WTO Agreement on Agriculture, as with the GATT agreement, is based on the MFN and NT principles. Its focus is on encouraging and strengthening the reform process of domestic agricultural regimes, with a view to reducing or eliminating distortions in the global market in the area of agricultural commodities. As many of the domestic regimes around the world, in particular those of the USA and the EC, have a highly distortive effect on trade in agricultural commodities, the WTO Agreement in Agriculture adopts an interim position with regard to the dismantlement of certain support mechanisms for the farming community. In no way does the agricultural agreement attempt, at this stage, to align the trade in agricultural commodities with that of non-agricultural commodities. That eventual target may take many successors to the current WTO Agreement on Agriculture to establish. The current agreement does go some way to addressing the distortions which arose from the particular political, economic and legal framework which resulted in the differentiation of agricultural

¹⁴⁷ of which more in chapter 8.

commodities from non-agricultural commodities, which will be discussed in detail in chapter 4.

Under the current WTO framework, agreements relevant to the global trade and support for production of agricultural commodities include;

2. The Agreement on Agriculture
 3. Agreement on the Application of Sanitary and Phytosanitary Measures (S&P Agreements),
 4. The Agreement on Technical Barriers to Trade,
 5. The Agreement on Subsidies and Countervailing Measures (Subsidies Agreement)
 6. The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), all part of the final texts of the 1994 GATT Uruguay round.¹⁴⁸
- These were eventually signed in Marrakech, Morocco, in April 1994, and came into force on the 1st January 1995.

The WTO Agreement on Agriculture focused on four areas:

1. Internal Support,
2. Export Subsidies,
3. Market Access, and
4. Food Security (to encourage stockpiling instead of trade protection, to achieve food security objectives).

While all of these issues have had an effect on the Common Agricultural Policy of the European Union, it is perhaps the internal support measures that have had the greatest, and most direct, impact in the short term.

7. Differing trajectories and different paradigms for the two levels of governance

¹⁴⁸ All of these agreements are covered in various chapters of this thesis.

(The following discussion is based on the views of Jens Ladefoged Mortensen.)¹⁴⁹

The governance of globalisation occurs within "a complex network of interconnected sites" in which "private and public actors bargain". Of the vast economic and political space which is envisioned in the word "governance" only "certain aspects" of this space are subject to "formal governance". At an institutional level, globalisation is fragmented between institutions, amongst them the IMF, the ILO, the World Bank and the WTO. The WTO is perceived by some as being the "only existing site of global economic governance which seems to have the potential for genuine rule-based governance of globalisation," although on the basis of its current construction, "it remains incomplete". As stated earlier, the WTO has evolved from GATT 1947, which developed, after the failure to ratify the Havana Charter, which was to bring about the International Trade Organisation, an "international trade organisation without any legal personality based upon a provisional agreement, provisionally staffed", and which was "funded on an ad hoc basis". Despite such a flawed institutional underpinning GATT 1947 developed, from the original model of intergovernmental negotiations, to an increasing codification of the GATT dispute settlement rules and procedures in stages, over time, which culminated in the 1994 WTO Dispute Settlement Understanding.

Over time, law, which was relegated to the sidelines, and in some cases ignored, in favour of politics and diplomacy, increasingly came to the fore within the GATT framework. The increasing legalisation of the GATT was reflected in 1983 with the opening of the GATT legal office, with the objective of improving "expertise, quality, credibility and confidence in panel findings", to the extent that it is now recognised that knowledge, complimented with legal norms "have become bargaining assets in the WTO". This was followed by the opening of the

¹⁴⁹ Mortensen, Jens Ladefoged; *The Institutional Requirements of the WTO in an Era of Globalisation: Imperfections in the Global Economic Polity*, E.L.J. 2000, 6(2), 176-204, from page 176 et seq.

"independent legal advisory centre in Geneva" after the Seattle meeting, which remains "entirely voluntarily funded" by WTO member states. There is, however, a danger to lawyers in assuming that the WTO is now based exclusively on legal precepts, as the "rule of law has not meant the end of politics", but rather the WTO operates on the twin pillars of law and politics, with the interaction of the "legalisation of trade politics" and the "politics of judicialisation" being seen as the basis for future WTO research into the interaction of the "WTO legal system and the WTO bargaining processes".

Although the WTO is being increasingly legalised, and is undoubtedly a more rule based system than the GATT, it is still seen to be highly flawed from a legal governance point of view. The WTO is seen as a weak enforcer, a weak monitor and a weak legitimiser, which suffers from a lack of resourcing¹⁵⁰ and a "lack of institutional autonomy". Ladefoged Mortensen has called for a "more complex legal system" for the purpose of regulating global market integration. As "globalisation cannot be regulated by institutions of a classic, intergovernmental nature", but needs rather to be regulated by "institutions that are of an ultra national or semi-federal kind".¹⁵¹ This echoes the observation of the OECD,¹⁵² that the GATT puts us under pressure to move from the traditional "trade" policy" to a more "integration" model used by the EC. In addition, Ladefoged Mortensen has observed that the WTO relies on too few governments "which possess adequate institutional resources"¹⁵³ in tackling complex trade issues. If the WTO documents are to become a "proto-constitution"¹⁵⁴ this imbalance needs to be redressed.

7.1 Governance of the EC

¹⁵⁰ "The WTO budget is only about 1.7% of the combined budget for the six international economic organisations", Ibid. at page 197.

¹⁵¹ Op. cit. footnote no. 149, at page 190.

¹⁵² Op. cit. footnote no. 39, at page 46.

¹⁵³ Op. cit. footnote no. 149, at page 203.

¹⁵⁴ Ibid. at page 203.

Like the WTO, the governance structure of the EU comprises the treaties, the case law, and in the case of the EC, the secondary legislation, which is quite substantial, together known as the *acquis communautaire*. The institutions of the EC and EU are much more numerous,¹⁵⁵ and varied, than that of the WTO/GATT structure.¹⁵⁶ The EU, uniquely, has the "most densely institutionalised network of international regimes and organisations in the world".¹⁵⁷ As stated by Mancini, in no other international organisation is there such "law-making and judicial powers" given,¹⁵⁸ with law being seen as a "basic instrument and a central symbol of European integration".¹⁵⁹

The EC is perceived as being a community of law, with law being seen as both the hard law, of the Treaties, regulations, directives, decisions, and case law of the ECJ and the CFI, and also, soft law, amongst other things, political agreements, declarations, charters, recommendations and opinion.¹⁶⁰ The law of the EC is described as being supranational, benefiting from the principles of supremacy and direct effect, developed by the ECJ in its more activist mode, "over the strong objections of several Member State executives",¹⁶¹ with the law of the other two pillars of the EU, the Common Foreign and Security Policy, and Police and Judicial Co-operation in Criminal Matters¹⁶² being seen as more intergovernmental in nature, and more subject to the dilution of legal norms by politics than occurs in the EC pillar.

¹⁵⁵ "By the early 1990s, the annual regulatory output of the European Community was greater than that of most individual states and 75-80 per cent of national legislation was subject to prior consultation with the European Commission". Marks, Gary, Hooghe, Liesbeth, Blank, Kermit, European Integration from the 1980s: State-Centric v. Multi-level Governance, J.Com.Mar.St.1996, 34(1), 341-378, page 334, footnote no. 1.

¹⁵⁶ Friis, Lykke, Murphy, Anna, The European Union and Central and Eastern Europe: Governance and Boundaries, J.Com.Mar.St. 1999, 37 (2), 211-232, at page 214 et seq.

¹⁵⁷ Risse-Kappen, Thomas; Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union. J.Com.Mar.St. 1996, 34 (1), 53-80, at page 59.

¹⁵⁸ Op. cit. footnote no. 115, at page 595.

¹⁵⁹ Snyder, Francis G., The effectiveness of European Community Law: institutions, processes, tools and techniques, M.L.R. 1993, 56(1), 19-54, at page 19.

¹⁶⁰ Op. cit. footnote no. 156, at page 216.

¹⁶¹ Marks, Gary, Hooghe, Liesbeth, Blank, Kermit, European Integration from the 1980s: State-Centric v. Multi-level Governance, J.Com.Mar.St.1996, 34(1), 341-378, at page 371.

¹⁶² The Post Amsterdam version of the Justice and Home Affairs Pillar.

Governance in the EC started with what has been labelled the "Monnet Method",¹⁶³ which focused on national elites, with little involvement for popular vote, thereby giving rise to what is now referred to as the democratic deficit within the EC structure, and the governance crises which are perceived as existing within the EC, and which are addressed by the Commission white paper, "European Governance; A White Paper",¹⁶⁴ and the Laeken Declaration on The Future of the European Union.¹⁶⁵ The European Parliament has progressively benefited from a development in its role of decision making, under the Single European Act and under the Maastricht Treaty, with the development of co-operation¹⁶⁶ and co-decision procedures,¹⁶⁷ which has "transformed the legislative process from a simple Council-dominated process into a complex balancing act between the Council, Parliament and Commission", with these two procedures, since the Maastricht Treaty, now applying "to the bulk of" EC legislation.¹⁶⁸

In addition to the balancing act between these three legislative institutions, the ancillary committees of the Economic and Social Committee¹⁶⁹ and the Committee of the Regions¹⁷⁰ also operate in the governance process in a consultative capacity, with the European Central Bank and the European System of Central Banks, exercising their unique role with regard to the European Currency, the Euro, under Articles 105 to 124 EC. In addition, in recent years, reinforced by the development of the principle of subsidiarity¹⁷¹ and its enshrinement into the EC treaty in Article 5, "sub-national actors" have become

¹⁶³ Carter, Cairtriona and Scott, Andrew, Legitimacy and Governance Beyond the European Nation State: Conceptualising Governance in the European Union, E.L. J. 1998, 4(4), 429-447, at page 434.

¹⁶⁴ Brussels, 25.7.2001, COM (2001) 428.

¹⁶⁵ Laeken, 15 December 01, SN 273/01

¹⁶⁶ Article 6 SEA, now Article 252 EC post Amsterdam.

¹⁶⁷ Article 251 EC post Amsterdam.

¹⁶⁸ Op. cit. footnote no. 161, at page 364.

¹⁶⁹ Articles 257 to 262 EC post Amsterdam.

¹⁷⁰ Articles 263 to 265 EC post Amsterdam.

¹⁷¹ Which has its origins as far back as Aristotle, but more recently has been espoused, *inter alia*, in the Papal Encyclical of Pope Pius XI, "Quadragesimo Anno," of the 15th May 1931.

players in the EC governance structure, both from regionalised, and now more recently, from "more centralised Member States".¹⁷² The interaction between the supranational, national and sub-national level of governance within the EC, resulting in "horizontal and vertical linkages among state and sub-state actors"¹⁷³ varies considerably from one member state to another. EC requirements for sub-national bodies with which to interact has even lead to to the creation of structures within some states in order to fulfil the requirement of EC Regional policy,¹⁷⁴ and the funding mechanisms of the ERDF,¹⁷⁵ to consult with sub-national actors.

This whole system is reinforced by ECJ case law developing "directly binding legal authority and supremacy" indicating that the EC "is becoming a constitutional regime",¹⁷⁶ and provides a much more highly legalised, active, and coherent governance structure than the WTO/GATT regime. While the EC recognised the need to change and to reinforce its governance regime, as set out in the white paper,¹⁷⁷ the EC and the WTO governance structure, both relevant to the discussion of Agriculture law, vary considerably. This difference between the two levels of governance will have an impact on the future developments of law at these two levels of governance, an issue which will be revisited in chapter 7.

8. Conclusion

In this introductory chapter I have attempted to identify some of the threads which will be woven together to develop this thesis. I highlighted the fact that the concept of land has been limited by conventional economic thinking.

¹⁷² Op. cit. footnote no. 161, from 341 et seq.

¹⁷³ Op. cit. footnote no. 157, at page 60.

¹⁷⁴ Founded on the basis of Regulation 724/75 [1975] OJ L 73/8.

¹⁷⁵ European Regional Development Fund, which originated from Article 8, Regulation (EEC) No. 4256/88, OJ L 374, page 25.

¹⁷⁶ Op. cit. footnote no. 161, at page 369.

¹⁷⁷ Brussels, 25.7.2001, COM (2001) 428.

The expediency referred to by John Stuart Mill¹⁷⁸ has limited the development of models on land, land values and land use, which limitations are now causing problems in dealing with a multifunctional concept of land. Daly and Cobb argue that economics, which is a highly influential force on the nature and tenor of law, fails to factor into economic theories all of the properties of "land", thereby giving it a distorted, or stunted view of "land". These differing views, would, *inter alia*, influence in different ways the use and exploitation of natural exhaustible resources. Society however now requires the consideration of the social dimensions of commercial and corporate law, as evidenced in the corporate governance debates. It also requires the development of a modified theory of land and of production from and use of land, in order to accommodate both the "economic drives of man" and the "operation of nature's laws",¹⁷⁹ and the concepts of sustainability and multifunctionality.

The development of globalisation, relying on the western capitalism model, at the expense of other models¹⁸⁰ and regionalisation was also examined in some depth, recognising the 20th century phenomenon of the "erosion of the Westphalian nation state",¹⁸¹ and the interdependent relationship between regionalisation and globalisation. The locating of the WTO within the public international law jurisdiction, and the EC in a *sui iuris* legal jurisdiction brings with it possible conflicts for the legal interaction between the two organisations. The two organisations are subject to different legal forces, and their trade policies, and agricultural policies, are tempered to quite different extents, by other policies, such as environmental or labour issues. The governance models of the two organisations also differ quite dramatically, with the WTO being perceived as suffering from a lack of dynamism,¹⁸² being limited by the provisions of the GATT and allied treaties. In contrast the EC, while being

¹⁷⁸ John Stuart Mill's *Principles of Political Economy*, referred to in "For the Common Good: redirecting the economy toward community, the environment, and a sustainable future"; Herman E. Daly & John B. Cobb, Jr., Beacon Press, 1994, at page 105.

¹⁷⁹ Op. cit. footnote no. 28, at page 99.

¹⁸⁰ Op. cit. footnote no. 53, at page 4.

¹⁸¹ Op. cit. footnote no. 33, at page 4.

required to operate within the parameters of the EC treaty, operates a much more active governance structure, with an elaborate balancing of powers between a number of institutions, and an active development of secondary law, and case law of the ECJ and the Court of First instance. The fact that only member states are subject, at a public international level, to the provisions of the GATT/WTO treaty texts, and that individuals, both natural and corporate, in addition to member states, are subject to EC law, with EC law forming part of national law, adds a very important dimension to the interaction, or "autonomous, linked games" of Coleman and Tangerman,¹⁸³ between the EC and the WTO in the area of Agriculture.

When the international trade principles are juxtaposed against the EC principles the enormity of the task of ensuring the smooth interaction between the two legal systems is maintained as their relationship develops over time. The international trade principles operated by the WTO on a quasi-legal, quasi-political basis of "equal treatment between foreigners and nationals, the most-favoured-nation principle, the open-door principle, the principle of preferential treatment, the principle of fair treatment",¹⁸⁴ appear to be written in a different language to that of the EC. The "principal characteristics" of the EC, as stated by Dagtoglou, are "the specific, independent Community institutions, the fact that individuals, alongside the Member States" are subject to EC law, "the direct effect of certain rules of Community law, the primacy of Community law over national laws, including constitutional law even the constitutional protection of individual rights", allied to the creation of "obligatory procedures" in dealing with the ECJ, and the binding effect of the decisions of the ECJ, in addition to

¹⁸² Op. cit. footnote no. 39, at page 52.

¹⁸³ William D. Coleman and Stefan Tangermann; The 1992 CAP Reform, the Uruguay Round and the commission: Conceptualizing Linked Policy Games, *Journal of Common Market Studies*, Vol. 37, No. 3 pp. 385-405.

¹⁸⁴ Op. cit. footnote no. 58, at page 16, quoting from G. Erler, *Grundprobleme des internationalen Wirtschaftsrechts* (Göttingen, 1956).

the principle of "Community liability for unlawful conduct of its institutions or servants."¹⁸⁵

In addition to the major differences in the governance and the type of law operated by the EC and the WTO, the perspective of these two organisations on the issue of Agriculture also differs quite markedly. The Punta del Este¹⁸⁶ declaration states as one of the objectives of the Uruguay round texts the "increasing (of discipline) on the use of all direct and indirect subsidies and other measures affecting directly or indirectly agricultural trade".¹⁸⁷ The emphasis of the CAP is coming from one which emphasised the social stability of rural areas,¹⁸⁸ and ongoing controlled markets within the EC, as reflected in the second pillar of the CAP and the evolving European Rural policy.

The Millennium round has reopened negotiations pursuant to Article 20 of GATT. The lengthy stand-offs between the United States, the European Union and the Cairns group could be back. The Doha declaration states that the long-term objective is to "establish a fair and market-oriented trading system through a programme of fundamental reform".¹⁸⁹ The current negotiations, which have already overshot their original target completion date of the 1st of January 2005, are still ongoing, with little substantive progress, of which more in chapter 8. The negotiating parties have as their target substantial reductions in hindrances to market access, together with "reductions of, with a view to phasing out, all forms of ..domestic support" together with "substantial reductions for supports that distort trade".¹⁹⁰ The EC, for its part, is coming to the negotiation table with the concept of multifunctionality,¹⁹¹ which it intends to promote on a global level.¹⁹²

¹⁸⁵ Op. cit. footnote no. 106, at page 40.

¹⁸⁶ September 1986.

¹⁸⁷ Schott, Jeffrey J. assisted by Buurman, Johanna W., *The Uruguay Round: an Assessment*, Institute for International Economics, Washington D.C., 1994, at page 44.

¹⁸⁸ Stresa Conference 1958.

¹⁸⁹ At point 13, available at

http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm, (accessed on the 1st August 06)

¹⁹⁰ Ibid. at point 13.

¹⁹¹ Op. cit. footnote no. 19, at page 1.

The current situation poses many problems. It will be interesting to see if the Millennium round of Agricultural negotiations will be in a position to provide any solutions.

¹⁹² Opinion of the Committee of the Regions on: the 'Proposals for Council Regulations (EC) concerning the reform of the common agricultural policy'; 'Council Regulation (EC) on the financing of the common agricultural policy'; 'Council Regulation (EC) amending Regulation (EEC) No 1766/92 on the common organization of the market of cereals and repealing Regulation (EEC) No 2731/75 fixing standard qualities for common wheat, rye, barley, maize and durum wheat'; 'Council Regulation (EC) establishing a support system for producers of certain arable crops'; 'Council Regulation (EC) on the common organization of the market in beef and veal'; 'Council Regulation (EC) on the common organization of the market in milk and milk products'; 'Council Regulation (EC) amending Regulation (EEC) No 3950/92 establishing an additional levy in the milk and milk products sector'; 'Council Regulation (EC) establishing common rules for direct support schemes under the common agricultural policy'; 'Council Regulation (EC) on support for rural development from the European Agriculture Guidance and Guarantee Fund (EAGGF)' CdR 273/98 fin, Official Journal C 93, 06/04/1999 p. 1.

Contents**1. Introduction****1. Multifunctionality Debate****2.1 EC multifunctionality****2.2 OECD multifunctionality****3. Before and after the EEC Treaty****4. The Common Organisations and the Mac Sharry reforms generally****4.1 The MacSharry Reforms****5. 1999 Reforms****6. The Mid-term review****7. Conclusions****1. Introduction**

The importance of the CAP as an EC policy is reflected in the fact that, although forestry is increasing in importance in various member states, agriculture utilises over 80% of the territory of the European Union,¹ and is the major consumer of European Community resources. The EC definition of agriculture is broader than that being used in this dissertation. Article 32 EC² provides that "agricultural products", to which the CAP applies, includes "products of the soil, of stockfarming and of fisheries and products of first stage processing directly relating to these products". The actual list of agricultural products, as recognised by the CAP, is set out in Annex 1 of the EC Treaty.³ As stated at the beginning of

¹ The Cork Declaration; November 1996, <http://www.europa.eu.int>.

² Ex. Article 38 EC.

³ Article 32.3 EC.

chapter 1, the definition of agriculture being used for the purposes of this thesis is that used in the WTO Agreement on Agriculture, Annex 1.⁴

National agricultural policies of the member states of the EU have for many years been subject to the provisions of the Common Agricultural Policy of the EC. This policy has both internal (to the EC) and external, in the context of global trade in agricultural products, implications. How "common" the agricultural policy has been over the years since its inception, has been a matter of debate. What is undisputed that the emphasis of the CAP has changed with time, with the initial emphasis being on financial support for agricultural product production, through intervention mechanisms, to now an increasing emphasis on producer support allied with rural development, with an EC Rural policy currently being devised,⁵ of which more in chapter 8. These changes have been strongly influenced by the EC's legal relationship with the WTO, which will be the focus of this thesis.

The origin of the CAP in 1957, in the wake of World War II, when food security was uppermost in the minds of the drafters of the Treaty of Rome, is partly the cause of some of the anachronistic elements of the policy. There was an "inability to agree on the most appropriate mechanism for European co-operation in agriculture" leading up to the Spaak Report, which was reflected in the "Treaty of Rome provisions on agriculture".⁶ This ambiguity has now been overlayed by

⁴ In line with Annex 1,1.i. I am not therefore going to be examining issues pertaining to fish and fish products. However, EC documentation dealing with numbers involved in agricultural activities will probably contain figures relevant to the fisheries sector. I do not intend to conduct an investigation into the figures in order to establish which proportion of EC Agricultural figures relate to the narrower definition of agriculture being used in the WTO Agreement on Agriculture, Annex 1. One such figure would be the size of the European population directly affected by the CAP, either in agriculture, or in upstream or downstream industries, estimated by Frans Fishler in 1997 (Fishler, Franz; Forces for change in the European Union, ABARE Conference 1997, Canberra, Australia, <http://www.europa.eu.int>) as being approximately 8 million people.

⁵ The Agricultural Situation in the European Union 2000 Report, Brussels, 11.02.2002, COM (2002) 67 final and Agenda 2000. <http://www.europa.eu.int/scadplus/leg/en/lvb/104000.htm>.

⁶ McMahon, Joseph A.; Law of the Common Agricultural Policy; Pearson Education, 2000, at page 2.

the shift in emphasis from a prices policy to a structural policy,⁷ and towards the evolving Rural policy, with the current incarnation of the CAP, even after the mid-term review, still exhibiting underlying tensions between the pre-existing agricultural legislation and the more "recent conservation legislation".⁸

The original ambiguity in the drafting of the CAP, allied with the trenchant political opposition to reform of the CAP over the years, leaves us today with a policy area much in need of reform. The CAP suffers from the added complexity of diversity of geography, climatology and agronomy, together with the influence of the strength of the non-agricultural economic activity of a particular member state, the population density of the particular agricultural area, such as in the sub-arctic, and its proximity to urban centres, which would, if present, provide a ready market for the higher value agricultural commodities of fresh fruit and vegetables. Not only are the objectives of the CAP often conflicting, and the preference for the prioritisation of one CAP objective over another reflecting the position of the various social partners at the negotiation table, but also the mix of agricultural activity is also quite diverse from one member state to another, and from one region of a member state to another.

The development of the CAP can be seen as evolving from both the internal and external pressures on the CAP to reform. The 1980's generated expensive side effects of the butter mountains and wine lakes, while the CAP, by 1988, had grown to account for over half of the EC Budget, with the estimation that the CAP cost 160 ECU to benefit a farmer by 100 ECU,⁹ resulting in serious inefficiencies also proving highly contentious, accounting for a very large volume of case law before the ECJ. The then anticipated accession of the central and eastern European countries to the EC, and from the need to accommodate the international trade agreements entered into by the EC on behalf of its member

⁷ Ibid, at page 120.

⁸ Howarth, William and Rodgers, Christopher P. (eds); *Agriculture, Conservation and Land Use: Law and Policy Issues for Rural Areas*, University of Wales Press, Cardiff, 1993, at page 2.

⁹ National Consumer Council, *The Future of the CAP: The NCC's Conclusions and Recommendations*, Consumers and the Common Agriculture Policy (1988), NCC.



states under the WTO Agreement on Agriculture in 1994, also acted as an important driver. The WTO negotiations have reopened, with the Millennium Round, which has been alluded to in chapter 1, and which will be examined in further depth in chapter 4, and in later chapters of this thesis. The EC response to these negotiations, which is the subject matter of this chapter, has resulted in the development of the concept of "multifunctionality", in conjunction with the more developed term of "sustainability". The term "sustainability" is being written into many policy documents. This term has achieved international recognition, with the definition used by the Brundtland commission¹⁰ widely accepted. How well the position of the EC stands up to the negotiation process of the Millennium round has still to be established, as the WTO agricultural negotiations are still ongoing at the time of writing. The Common Agricultural Policy has, however, been undergoing a transformation to reflect this new view point of the EC Agricultural directorate.

2. Multifunctionality Debate

2.1 EC Multifunctionality

The European Community first used the term "multifunctionality" in the Cork Declaration of 1996,¹¹ however "its origins can be found in Directive 286/75¹² on Mountain and Hill farming in less favoured areas".¹³ As Delgado et al. have pointed out, this directive "established the need" to subsidise non-competitive agriculture in the interest of "maintaining the territorial balance",¹⁴

¹⁰ OECD; Policies to Enhance Sustainable Development; OECD 2001, at page 9, quoting from WECD. 1987 World Commission on Environment and Development (WECD) (1987), *Our Common Future*, Oxford University Press, Oxford, UK.

¹¹ Op. cit. footnote no. 1.

¹² Council Directive 75/268/EEC of 28 April 1975 on mountain and hill farming and farming in certain less- favoured areas, Official Journal L 128, 19/05/1975 p. 1

¹³ del Mar Delgado, M^a, Ramos, Eduardo, Gallardo, Rosa and Ramos, Fernando; Multifunctionality and rural development: a necessary convergence, at page 19, Ch 2 in Guido van Huylenbroeck and Guy Durant (Eds.) *multifunctional Agriculture A New Paradigm for European Agriculture and Rural Development*, Ashgate, Aldershot 2003, at page 28.

¹⁴ Ibid at page 28.

with this directive establishing for the first time the "willingness of (EC) society to pay for sustaining areas which otherwise would undergo both swift and generalised economic, social and environmental deterioration".¹⁵

The European Community's views of multifunctionality are still at a policy stage, and have yet to be written into legal texts,¹⁶ however its concept, along with that of sustainability, is being strongly supported by the EC in light of the current round of WTO Agricultural talks.¹⁷ It is the Agricultural directorate's view that the issue of multifunctionality in agriculture encompasses the issues of "safe and high quality goods", the protection of the environment, the saving of "finite resources", the preservation of rural landscapes,¹⁸ and the contribution that agriculture makes to the "socio-economic development of rural areas including the generation of employment opportunities".¹⁹ The European Commission is of the view that the "multifunctional character of agriculture" is a "key issue to be

¹⁵ Ibid. at page 28.

¹⁶ Although the policy seems to be reflected in the drafting of Council Regulation (EC) No. 1782/2003, OJ L 270/1, dealing with the single farm payment under the mid-term review.

¹⁷ "It is essential that the sustainability and multifunctionality principles underpin - and become the norm in - future world agricultural trade negotiations." Opinion of the Committee of the Regions on: the 'Proposals for Council Regulations (EC) concerning the reform of the common agricultural policy': 'Council Regulation (EC) on the financing of the common agricultural policy'; 'Council Regulation (EC) amending Regulation (EEC) No 1766/92 on the common organisation of the market of cereals and repealing Regulation (EEC) No 2731/75 fixing standard qualities for common wheat, rye, barley, maize and durum wheat'; 'Council Regulation (EC) establishing a support system for producers of certain arable crops'; 'Council Regulation (EC) on the common organisation of the market in beef and veal'; 'Council Regulation (EC) on the common organisation of the market in milk and milk products'; 'Council Regulation (EC) amending Regulation (EEC) No 3950/92 establishing an additional levy in the milk and milk products sector'; 'Council Regulation (EC) establishing common rules for direct support schemes under the common agricultural policy'; 'Council Regulation (EC) on support for rural development from the European Agriculture Guidance and Guarantee Fund (EAGGF)' CdR 273/98 fin, Official Journal C 93, 06/04/1999 p. 1.

¹⁸ Reference has been made to the European Landscape Convention, adopted by the Council of Europe's Committee of Ministers on 19 July 2000, was signed on 20 October 2000 by 18 countries during a Ministerial Conference in Florence, by the European Commission in the EU: COM(2001) 31, Celex No. 501DC0031, European Union Preparatory Acts, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions On the sixth environment action programme of the European Community 'Environment 2010: Our future, Our choice' - The Sixth Environment Action Programme /* COM/2001/0031 final */, Managing the countryside.

¹⁹ Info-Paper, Agriculture: Process of analysis and Information Exchange of the WTO; Contribution of the European Community on the Multifunctional Character of Agriculture, October 1999, at <http://www.europa.eu.int>, at page 1.

addressed in the WTO context".²⁰ The EC recognised that agriculture provides "services" which are "mainly of a public good character".²¹ The importance of landscape includes "stone walls, terraces, trees and farm woodlands and archaeological features" which contribute to the "cultural landscape".²² The specific character of land as a commodity is recognised when the Commission states that unused land does "not automatically revert to its original wild state", and "continued usage" in a well adjusted way is a prerequisite for maintaining its environmental value.²³ The cross-compliance requirements of the single farm payment, introduced in the mid-term review of the CAP,²⁴ would appear to address a number of these issues, of which more in chapter 8.

During the pre-mid-term review debates in the European Community, it was perceived that there was a tendency to "under provide" the public service element of agricultural production, as the producers of these services were "often not or not sufficiently rewarded by the market".²⁵ The requiring of farmers to produce the "environmental benefits from land use" by virtue of the mere ownership of land could be considered an "infringement of private property rights", thus necessitating the carrot approach, of encouraging the provision of these services through a reward mechanism.²⁶ As stated by the Committee of the Regions, "farmers must be ready to observe basic environmental standards without compensation", however, if a "higher level of environmental service" is

²⁰ Ibid. at page 1.

²¹ Ibid. at page 1.

²² Ibid. at page 2.

²³ Ibid. at page 2.

²⁴ Council Regulation (EC) No 1782/2003 of 29th September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No. 2019/93, (EC) No. 1452/2001, (EC) No. 1453/2001, (EC) No. 1454/2001, (EC) 1868/94, (EC) No 1251/1999, (EC) No. 1254/1999, (EC) No. 1673/2000, (EEC) No. 2358/71 and (EC) No. 2529/2001, OJ 2003, L 270/1.

²⁵ Ibid.

²⁶ Ibid.

being provided, then farmers should be "remunerated by appropriate agri-environmental measures".²⁷

It should be noted at this point that multifunctionality as a concept, has had a "long tradition in both the U.S. and other countries", with the "non-food outputs of agriculture" representing "legitimate domestic policy objectives" in the view of the U.S. Department of Agriculture,²⁸ with non-food objectives being referred to as "externalities" by economists.²⁹ A problem arises, however, with the economic measurement of these "externalities" of agricultural production, as the "non-market benefits or costs are usually not known", with "cost effective rankings" are used as a substitute for measurement.³⁰ The view of USDA on these externalities is that "most non-food outputs can be produced independently of agriculture" and that a "range of policy instruments and private actions are available" to achieve the required agricultural externalities.³¹

This philosophy of the EC with regard to the future of agriculture within the EC, was reflected in Agenda 2000. Emphasis continued, however, to be put on production; the Commission recognising that this was leading, to continuing pressure on landscape and its related bio-diversity,³² which is of great importance in the more fragile eco-system areas. The Commission had recognised that "a landscape can be regarded as a system comprising a specific geology, land use, natural and built features, flora and fauna, watercourses and climate," to which

²⁷ Opinion of the Committee of the Regions on the "Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on Directions towards sustainable agriculture" OJ C 156, 6/6/2000, page 40.

²⁸ Bothman, Mary, Cooper, Joseph, Mullarkey, Daniel Normile, Mary Anne, Skuly, David Vogel, Stephen and Young; Edwin; The Use and Abuse of Multifunctionality, Economic Research Service/ USDA, November 1999, (<http://www.ers.usda.gov/Briefing/WTO/PDF/multifunc1119.pdf> accessed on the 8th August 06), at page 22.

²⁹ Ibid. at page 9.

³⁰ Ibid. at page 10.

³¹ Ibid. at page 22.

³² Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions Directions towards sustainable agriculture (1999/C 173/02 EC C173/2 Official Journal of the European Communities 19.6.1999.

“should be added habitation patterns and socio-economic factors.”³³ There was a fear in European agricultural circles that the production model of agriculture will result in the abandonment of the land by large numbers of marginal farmers to the extent that “scrub and forest encroach and the open landscape will disappear,”³⁴ which would not be easily recoverable. European Environmental policy, for its part, dealt with some of the issues of sustainability in agriculture, with its directives on Habitats and Wild Birds,³⁵ with the Habitats directive setting up “special areas of conservation” (SPAs) which have been vigorously defended by the ECJ in the case *Commission v. Germany (Leybucht Dykes)*,³⁶ when it made it clear that “general economic and recreational interests” do not allow for removal or destruction of SPA land.³⁷ The social issues of underlying agricultural reform are beginning to receive a specific focus within the agricultural directorate with the development of a European rural policy.³⁸ The concern with these issues is reflected in the requirements of the cross compliance requirements under the mid-term review (of the Agenda 2000 reforms)³⁹ of which more in chapter 8. The mid-term review itself,⁴⁰ with its regional and national differentiation options, allied with the concept of multifunctionality, “opens up” “scope for variations across and within countries”,⁴¹ reflecting the “‘spill back’ pressures within a mature sector for the re-nationalisation to member states of elements of agricultural policy”, as discussed by Greer.⁴²

³³ Ibid.

³⁴ Ibid.

³⁵ Council Directive 79/409/EEC on the Conservation of Wild Birds OJ 1979, L 103 1979 and Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora, OJ 1992, L 206, p. 7.

³⁶ Case 57/89 *Commission v. Germany (Leybucht Dykes)* [1989] ECR 2849.

³⁷ Ibid. at paragraph 22.

³⁸ under Directorate E of the Agricultural Directorate general.

³⁹ McMahon, Joseph A: *The Common Agricultural Policy: From Quantity to Quality?* NILQ, Vol. 53, No. 1, at page 9.

⁴⁰ Of which more in chapter 8 of this thesis.

⁴¹ Greer, Alan; *Agricultural policy in Europe*, Manchester University Press, 2005, at page 66

⁴² Ibid, at page 3.

The understanding of the necessary focus of a multifunctional agriculture differs from one EC member state to another, with different areas focusing on different elements of the wide range of potential “social concerns relating to the maintenance of the fabric of rural areas and the protection of the environment”.⁴³ The concept of multifunctionality, allied with the mid-term review therefore leads to “variety across States”,⁴⁴ with “plenty of room for special and territorial variation”,⁴⁵ with countries, to date, such as the UK and the Netherlands taking a much broader approach to the issue of “rural society” than countries such as Ireland and Greece, which still maintain an agriculture production focus.⁴⁶ This therefore necessitates the development of “policies and programmes that are flexible”, rather than a policy based on commonality.⁴⁷ This is reflected in the cross-compliance requirements and single farm payments introduced under the recent mid-term review of Agenda 2000, which will be discussed in chapter 8.

How broadly exactly the term “multifunctionality” can be drawn is however an issue, with some authors wondering whether “ethical views on food production” can be made relevant to the debate.⁴⁸ Blanford and Fulponi have pointed out that the asymmetry in “information between the buyer and seller” concerning animal welfare principles is “a specific type of market failure”,⁴⁹ leading to a “dysfunction in the market”.⁵⁰ Whether an EC concept of the multifunctionality of agriculture could be expanded to encompass animal welfare principles will be an issue for the WTO agreement on Technical Barriers to Trade, an agreement which will be discussed in chapter 8.

⁴³ Ibid. at page 2

⁴⁴ Ibid. at page 2

⁴⁵ Ibid at page 3.

⁴⁶ Ibid. at page 2.

⁴⁷ Ibid. at page 66.

⁴⁸ Blanford, David and Fulponi, Linda; *Emerging public concerns in agriculture: domestic policies and international trade commitments*; *European Review of Agricultural Economics* Vo. 26(3) (1999) pp. 409-424, at page 410.

⁴⁹ Ibid. at page 414.

⁵⁰ Ibid. at page 414.

The issue of the market failure for the public good services of a multifunctional agriculture also brings into its parameters the evolving rural policy of the EC, pursuant to Council Regulation (EC) No. 1257/99⁵¹ to the extent that it contributes to the social, economic and environmental aspects of rural society. Whether there will always be market failure for these aspects of agricultural activity can however be challenged when a comparison is made with recent developments in environmental law and policy. The development of the integrated product policy under the EC's Sixth Environmental Action Programme which will be discussed in chapter 8, could perhaps indicate one possible route for development of a multifunctional agriculture. In addition the development of the greenhouse gas emission allowance trading scheme,⁵² also discussed further in chapter 8, could perhaps indicate a second possible route for development of a truly multifunctional CAP, addressing some of the issues of market failure for public good outputs for agricultural activities. While both of these latter developments are currently focused on non-agricultural aspects of the EC's Environmental policy, there is a possibility that these schemes, or the principles underlying these schemes, could be extended to agricultural activities, addressing some of the issues of the market failure for the public good aspects of the multifunctionality of agriculture. All of this puts pressure on the land-economics nexus referred to in chapter 1, and which will be discussed further in chapter 8.

International agreement will however have an impact on the development of the EC's concept of multifunctionality, particularly as they are seen as posing "an impediment to addressing social concerns" in their focus on "freer agricultural trade".⁵³ The issue of how international trade documents should reflect the concept of multifunctionality has been addressed by the OECD.

⁵¹ Council Regulation (EC) No. 1257/1999 OJ L. 106, 26/6/1999, p. 80.

⁵² Directive 2003/87/EC of the European Parliament and the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community amending Council Directive 96/61/EC, OJ L 275/32.

⁵³ Ibid. at page 410.

2.2 OECD multifunctionality

Multifunctionality as a concept has been examined by the OECD in their paper "Multifunctionality: towards an analytical framework".⁵⁴ The OECD is of the opinion that the term multifunctionality "is not well defined" and is "prone to different interpretations".⁵⁵ They identify two concepts of multifunctionality, the normative concept of multifunctionality, and the positive concept of multifunctionality. The normative concept is to view "multifunctionality in terms of multiple roles assigned to agriculture", with multifunctionality being "not merely a characteristic of the production process", but being a "value in itself", with the maintenance of the "multifunctional activity" being a policy objective in itself.⁵⁶ This approach to multifunctionality is rejected by the OECD as being unacceptable. The approach to multifunctionality adopted and examined by the OECD is what they term the "positive" concept of multifunctionality".

The positive concept views multifunctionality as being a "characteristic of" any economic activity, but it is particularly prevalent in the agricultural and forestry industries. This concept examined the "multiple, interconnected outputs or effects". These effects can be either positive or negative, intended or otherwise.⁵⁷ These outputs are classified as commodity and non-commodity outputs. Under this model both land and labour are regarded as inputs, with the "role of biological processes in production, the close relationship with the environment, and the impact on the rural economy" all being relevant issues.⁵⁸ The non-commodity outputs are deemed to "exhibit the characteristics of externalities or public goods", a market for which either does not exist, or

⁵⁴ OECD: Multifunctionality: Towards an Analytical Framework, Agriculture and Food, OECD, 2001.

⁵⁵ Ibid. at page 9.

⁵⁶ Ibid. at page 14.

⁵⁷ Ibid. at page 14.

⁵⁸ Ibid. at page 33.

"functions poorly".⁵⁹ An issue arises as to whether the approach should be to develop a market in public goods, or to protect public goods from market exploitation. The OECD asks whether alternative strategies for farming, or the adoption of other technologies could "decouple", or alter the degree of "jointness between commodity and non-commodity outputs", and if a market could be created for the provision of the "non-commodity outputs", which could operate separately from the existing commodity outputs of farming.⁶⁰ The inclusion of issues of "rural employment and food security" in the OECD discussion on multifunctionality was highly controversial, and the taking into consideration of these issues may again become a problem in WTO discussions on the issue of multifunctionality. This decoupling of payments advocated by the OECD, and required under the WTO Agreement on Agriculture,⁶¹ is reflected, to a certain extent, in the mid-term review redrafting of the CAP.

It is recognised by the OECD report that multifunctionality may have "different effects" in countries with different levels of development, however the OECD is of the opinion that their analytical framework should be operable in all countries. The OECD warn that the use of the concept of "multifunctionality could have domestic or international equity, or income distribution implications",⁶² and these "direct and indirect costs of international spillover effects" need to be taken into account when utilising the concept of multifunctionality in designing Agricultural policies.⁶³ To what extent these collateral consequences will arise from the mid-term review redrafting of the CAP has yet to be established.

⁵⁹ Ibid. at page 13.

⁶⁰ Ibid. at page 15.

⁶¹ which will be analysed in depth in chapter 4.

⁶² Op cit. footnote no.30, at page 22.

⁶³ Ibid. at page 15.

3. Before and after the EEC Treaty

The original design of the Common Agricultural Policy has led to the current discourse on multifunctionality of European agriculture. The design of the CAP was in the hands of the six original member states of the European Coal and Steel Community. It is important to remember that in the negotiating states, in 1957, the date of signing of the Treaty of Rome, "just over sixteen million people were employed in agriculture in the signatory countries", ⁶⁴ this accounted for "23 per cent of the total working population". ⁶⁵ None of the original member states had less than 10 per cent of their population in agriculture, while the UK, a non-signatory, who has since membership of the EEC had problems with the operation and structure of the CAP, had under four percent of its population engaged in agriculture. ⁶⁶ The prevailing model of Agricultural trade in the soon to be EEC member states was that of protectionism.

The Spaak Committee reported to the Council of the ECSC in 1956, and the ECSC Council "instructed a new committee to draft a treaty for a common market". ⁶⁷ The drafting committee of the ECSC Council, under the guidance of its rapporteur Pierre Uri, ⁶⁸ and using the Spaak report as a guide, made its report in early 1957. The report of the committee was heavily influenced by the political persuasions of the member states in the final drafting of the Treaty of Rome. While reduction of internal tariffs, together with the rules of competition were the general principles to be adopted for manufactured goods, in the area of agriculture the "achievement of a common market for agricultural products was closely

⁶⁴ Neville-Rolfe, Edmund; *The Politics of Agriculture in the European Community*, European Centre for Political Studies, May 1984, at page 33.

⁶⁵ *Ibid.* at page 33.

⁶⁶ *Ibid.* at page 33.

⁶⁷ *Ibid.* at page 190.

⁶⁸ *Ibid.* at page 190 et seq. Pierre Uri was to feature in later agricultural debates, when he suggested to the horror of all but a few that there should be a substantial reduction in support prices. The severity of the reaction to Uri's suggestion resulted in extreme caution to reform proposals of the CAP in the following years.

linked with that of the customs union," with the treaty setting out the timetable for its achievement.⁶⁹ How the objectives were to be achieved was "left very largely to the discretion of the Community's institutions". The social and structural elements of the CAP, which were to come to the fore in later years, were at the inception of the CAP "were scarcely defined at all".⁷⁰

The Spaak report saw that Agriculture would benefit from a common market as much as the industrial sector. It however advocated special treatment for agriculture,⁷¹ based on a price policy, given its unique concerns. In particular Agricultural production suffered from the fragmentation of the production process amongst family farms, instability in production due to natural causes, "inelasticity of demand" for many products, and the wide divergences in prices between member states, together with the perceived need of governments to support agriculture, "and the diversity of forms which this took".⁷² It was perceived that there would be a need to transfer sovereignty to the supra-national entity, that this transfer would have to be gradual, with the focus on specific products.⁷³ With regard to relations with third countries, the Spaak report's view was that "as far as possible external protection should be confined to duties and anti-dumping measures".⁷⁴ The Stresa Conference, which followed in 1958, also emphasised the need for social stability in rural areas, and the need to reinforce the family farm.

The original objectives of CAP⁷⁵ have of themselves been described as being multifunctional,⁷⁶ with Article 33 EC objectives, in particular, varying from that of increasing agricultural productivity, the stabilisation of markets, the assurance of availability of supplies, to the contrasting objectives of ensuring that

⁶⁹ Article 37 ex. Article 43 EC.

⁷⁰ Op. cit. footnote no. 64, at page 191.

⁷¹ Moehler, Rolf; The role of agriculture in the economy and society; paper presented at the Seminar on Beliefs and Values Underlying Agricultural Policies, Lake Balaton, Hungary, September 19-23, 1996, <http://www.fao.org/docrep/W7440E/w7440e03.htm> at 25/1/02, at page 2.

⁷² Op. cit. footnote no. 64, at page 191.

⁷³ Ibid. at page 193.

⁷⁴ Ibid. at page 192.

⁷⁵ Article 33 EC, ex. Article 39 EC.

⁷⁶ Op. cit footnote no. 17.

supplies reach consumers at reasonable prices. There is also a requirement for a fair standard of living for the agricultural community, by “increasing the individual earnings of persons engaged in agriculture”. No “hierarchy of objectives” between these provisions were provided in the treaty, with McMahon stating that these objectives “are both conflicting and not capable of reconciliation”.⁷⁷ The ECJ’s view, as epitomised in *Balkan* case,⁷⁸ has been that there was a need for a balancing act to be maintained between the competing demands of what is now Article 33.1 EC, with the need for “permanent harmonisation made necessary by any conflict between these aims taken individually”, and if necessary, “allow one of them temporary priority in order to satisfy the demands of the economic factors or conditions in view of which their decisions are made”.⁷⁹ McMahon points out that the *Balkan* formula conflicts with the provisions of Article 2 of Regulation 26/62, which requires all of the objectives of the CAP be met for an exemption from competition law provisions to apply.⁸⁰ The *Balkan* formula was developed on in *Crispoltoni II*,⁸¹ with reference to the latitude given to institutions in interpreting the *Balkan* formula in the *Behla Mühle* case.⁸² In *Crispoltoni II* the ECJ stated “that harmonisation must preclude the isolation of any one of those objectives in such a way as to render impossible the realisation of other objectives”.⁸³

The provisions of the EEC Treaty on Agriculture have been highly influential on other policy areas of the EC, with the agrimonetary system⁸⁴

⁷⁷ Op. cit. footnote no. 39, at page 12.

⁷⁸ Case 5/73 *Balkan* [1973] ECR 1091.

⁷⁹ Op. cit. footnote no. 39 at page 12, quoting from Case 5/73 *Balkan* [1973] ECR 1091, at paragraph 24.

⁸⁰ Op. cit. footnote no. 39, at page 12.

⁸¹ Joined cases C-133/93, C-300/93 and C-362/93; *Crispoltoni v Fattoria Autonoma Tabacchi and Natale and Pontillo v Donatab Srl.*; ECR 1994 page I-4863 .

⁸² Cases 114,116 and 119-20/76 *Behla-Mühle* [1977] ECR 1211.

⁸³ Op. cit. footnote no. 39, quoting from Joined cases C-133/93, C-300/93 and C-362/93; *Crispoltoni v Fattoria Autonoma Tabacchi and Natale and Pontillo v Donatab Srl.*; ECR 1994 page I-4863 at paragraph no. 31.

⁸⁴ The agrimonetary was originally set up in 1962, but its current incarnation came into force on the 1st of January 1993, by virtue of Council Regulation 3813/92, and Commission Regulation 3819/92, OJ. L 387, 31/12/92, p. 17.

originally designed to meet the needs of the CAP having, indirectly, led to the now single European Currency. The operation of the CAP itself however, operates at times in a different manner from other EC provisions. While it benefits from the principles of supremacy and direct effect, the "provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council".⁸⁵ The well developed provisions in Title VI, to include Articles 81 and 82, well known to EC lawyers through the years as Articles 85 and 86 EC, do not necessarily apply to agricultural products. On the contrary, where a common organisation of a particular agricultural commodity is set up under Article 34 EC⁸⁶ its operation may in fact be the antithesis of competition rules, in particular the "compulsory co-ordination of the various national market organisations" pursuant to Article 34.1.b EC. This situation is regulated by Regulation 26/62,⁸⁷ which remains law in the post- mid-term review of the EC agricultural legal structure. Under this regulation the current Article 82,⁸⁸ which deal with abuse of a dominant position, applies to all agricultural agreements. Article 81, on agreements between undertakings and concerted practices, does not apply to "such of the agreements, decisions and practices, as form an integral part of a national market organisation or are necessary for attainment of the objectives set out in" Article 33 EC, pursuant to Article 2.1 of Regulation 26/62. The exact extent of this exemption was the subject matter of litigation in the early years of the EC. The situation was eventually resolved in the *Suiker Unie* case,⁸⁹ where it was held that "for an agreement to come within the scope of the exception it must promote all of the objectives of the CAP, not just some of them".⁹⁰ A modified version of EC state aids⁹¹ provisions apply to agricultural activities pursuant to Article 4 of

⁸⁵ Article 36 EC, ex. Article 42 EC.

⁸⁶ Ex. Article 40 EC.

⁸⁷ OL L. 30, 20/4/1962, p. 993.

⁸⁸ Formerly Article 86 EC.

⁸⁹ Case 40/73, *Coöperatieve Vereniging Suiker Unie UA v. Commission of the European Communities*, also known as: *European Sugar Cartel*, and Case 49/73, *Re Suiker Unie v. Commission of the European Communities* [1975] ECR 1993, [1976] 1 CMLR 295.

⁹⁰ Op. cit. footnote no. 6, at page 16.

⁹¹ Articles 87 to 89, ex Article 92 to 94.

Regulation 26/62.⁹² If a state aid falls outside the provisions of Article 4 then the normal rules on state aids apply. If the provision falls within Article 4 then the provisions of the common organisation of the market will take precedence over the state aid issue.⁹³ What state aids are permissible have altered with the reform of the CAP through the years, and will be discussed later in this chapter, with a further discussion of EC Competition law, together with its state aids provisions being provided, in the context of their interaction with relevant WTO provisions, in chapter 7; an analysis of how competition law impacts on the new rural development provisions is given in chapter 8.

The Mansholt Plan,⁹⁴ of Commissioner Mansholt, followed in March 1968, which proposed restructuring the CAP in accordance with the policy paper "Agriculture 1980". The Plan sought to reduce the number of people employed in agriculture and to encourage the formation of larger, more efficient units of agricultural production. In the allied Memorandum on the Reform of Agriculture in the European Economic Community of December 1968, the Commission sought to deal with two problems which had arisen: emerging surpluses and the falling back of income growth in agriculture compared with the rest of the economy.⁹⁵ A very hostile reaction from the EEC's agricultural community ensued arising from the proposals for the reduction of arable areas and cow herds, particularly in 1971, with serious rioting in Brussels. The Mansholt plan, which was finally accepted in 1972,⁹⁶ operated as the beginning of a structural policy at Community level.⁹⁷

⁹² Article 4 of Regulation 26/62 provides that "the provisions of Article 93 (1) and of the first sentence of Article 93 (3) of the Treaty shall apply to aids granted for production of or trade in the products listed in Annex II to the Treaty."

⁹³ As per Case 177/78, *McCarron v. The Irish Pigs and Bacon Commission* [1979] ECR 2161, p. 2188. Op. cit. footnote no. 6, at page 17.

⁹⁴ <http://www.let.leidenuniv.nl/history/rtg/res1/Mansholt.html>.

⁹⁵ Op. cit. footnote no. 71, at page 5.

⁹⁶ Volonien, Risto; Secretary General of COPA and COGECA DIS (01) 04, Speech in AGRO-FOOD 2001; 7.2.2001; Tampere, Finland

⁹⁷ Op. cit. footnote no. 95, at page 5.

The drafting of the Mansholt Plan reflects the perception of agriculture current at that time. It was then perceived that there was a need to increase production, in order to "counterbalance the increased requirement resulting from the growth of the population"⁹⁸ and to raise the standard of living of the agricultural population, which was seen as being "sociologically of extreme importance for each country".⁹⁹ The agricultural population was seen as being strategic, being required to "make a great contribution"¹⁰⁰ in the development of post-war Europe, with Western Europe having at the time "a large import requirement of the most important items of food for man and beast".¹⁰¹

The then existing situation of high protectionism in each of the EEC member states of their agricultural sector had to be overcome. While surpluses were arising in some countries, the general picture was of under supply of commodities, with "extreme" protectionism¹⁰² hampering inter-community trade. Inter-community measures were therefore seen as being essential, in order to develop specialisation in production. True free trade, it was felt, could not be "entirely realised in agriculture",¹⁰³ given the strategic need of many countries to have "a certain agricultural production capacity available under all circumstances",¹⁰⁴ thereby anticipating over-supply of commodities in all but the most adverse climatic and other natural circumstances.

The Mansholt plan, at the time, recognised that "a uniform European price level"¹⁰⁵ was not then possible, however it was felt that it "would be possible to determine at what price, or between what price limits the products of the various countries could be interchanged",¹⁰⁶ with an emphasis on "no production power"

⁹⁸ History of European Integration Site: The Mansholt Plan, Leiden University Historical Institute at <http://www.let.leidenuniv.nl/history/rtg/res1/Mansholt.html>, accessed the 10.12.01, at page 1.

⁹⁹ Ibid. at page 3.

¹⁰⁰ Ibid. at page 1.

¹⁰¹ Ibid. at page 1.

¹⁰² Ibid. at page 2.

¹⁰³ Ibid. at page 3.

¹⁰⁴ Ibid. at page 3.

¹⁰⁵ Ibid. at page 4.

¹⁰⁶ Ibid. at page 4.

being left unutilised"¹⁰⁷ and the obtaining of the "highest possible achievements".¹⁰⁸ The acceptance of agricultural products from third countries into the community was to be "fixed by mutual agreement" ensuring that "these imports" could "only be admitted under a co-ordinated scheme".¹⁰⁹ It was recognised that there would be a need for "temporary stockpiling, to prevent disturbances", owing to weather and "fluctuations in agricultural production".¹¹⁰ Expenditure (and income) from this operation was to be "charged to and be for the benefit of a European Agricultural Fund".¹¹¹

The national protection measures were to be transferred to European control, with the protective measures to be reduced gradually, with a view to eliminating the intra-community protection measures, while ensuring a "reasonable livelihood" for "workers and employers of any well-managed European farm".¹¹² Measures taken by certain member states to protect vital national interests must be "subjected to the approval of a European organ".¹¹³ A European Board of Agriculture and Food (EBAF) was to be set up, to operate on the basis of an ordinary majority vote, and be answerable to the Council of Ministers, and to take instructions from them. On agricultural matters the Council of Ministers was to take decisions on the basis of qualified majority voting, with individual member states being in a position to "raise objection to any particular measure or decision of the EBAF with the Council of Ministers".¹¹⁴ If a qualified majority vote could not be obtained then the EBAF would have to revise its measure or decision. Recourse to "a juridical authority" was also advocated in "such controversies".¹¹⁵ In practice the EBAF was not set up, but agriculture became the only policy area where the Council was not assisted by the Committee

¹⁰⁷ Ibid. at page 4.

¹⁰⁸ Ibid. at page 4.

¹⁰⁹ Ibid. at page 4.

¹¹⁰ Ibid. at page 4.

¹¹¹ Ibid. at page 4.

¹¹² Ibid. at page 3.

¹¹³ Ibid. at page 3.

¹¹⁴ Ibid. at page 5.

¹¹⁵ Ibid. at page 5.

of Permanent Representatives (COEPER),¹¹⁶ but by the Special Committee on Agriculture,¹¹⁷ comprised of senior agricultural officials.¹¹⁸ The CAP has since occupied much of the time of the European Court of Justice, and a very large proportion of EC funds.

4. The Common organisations and the Mac Sharry reforms generally

Article 34 EC¹¹⁹ provides for the setting up of common organisations of agricultural markets. Three possible forms were provided for; 1. one based on the common rules on competition, 2. One based on compulsory co-ordination of the various national market organisations, and 3. A European market organisation. The superstructure of CAP was to be based on a three pillar structure,¹²⁰ one of "community preference, common prices and common financing".¹²¹ The first pillar, community preference, was based on Article 44.2,¹²² which has now been repealed by the Amsterdam Treaty. How effective the second pillar of common prices had operated, is questionable.¹²³ The third option of a European Common Market association proved to be very popular, with a large number having been set up.¹²⁴ These organisations resulted in the centralisation of policy with respect

¹¹⁶ COREPER would be involved if the matter overlapped with non agricultural policy areas.

¹¹⁷ The Special Committee on Agriculture was set up on 1960. See JO 1960 1217.

¹¹⁸ Op. cit. footnote no.6, at page 39.

¹¹⁹ Ex. Article 40 EC.

¹²⁰ McMahon is of the opinion that in later years a fourth pillar of co-responsibility was added. See Joseph A. McMahon, *Law of the Common Agricultural Policy*, Pearson Education, 2000, p.166.

¹²¹ Op. cit. footnote no. 64, at page 2.

¹²² Article 44.2 "Minimum prices shall neither cause a reduction of the trade existing between Member States when this Treaty enters into force or form an obstacle to progressive expansion of this trade. Minimum prices shall not be applied so as to form an obstacle to the development of a natural preference between Member States."

¹²³ Op. cit. footnote no. 64, at page 370 et seq.

¹²⁴ Prior to the mid-term review of the CAP there were 22 common market organisations and a number of other arrangements:

Cereals	Council Regulation 1766/92	(OJ L No. 181/21);
Pig Meat	Council Regulation 2759/75	(OJ L No.282/1);
Eggs	Council Regulation 2771/75	(OJ L. No.282/49);
Poultry	Council Regulation 2775/75	(OJ L No.282/77);
Fruit and Vegetable	Council Regulation 1035/72	(OJ L No.118/1);

to each product covered. National organisations were effectively replaced by Common organisations, with national organisations only being permitted to operate to the extent that they do not conflict with Common organisations.¹²⁵ Market organisations could have been grouped and classified according to the extent and degree, or the absence, of market support. This support depended on the economic importance, or lack of same, of the relevant commodity to the Community. Products with the greater economic importance had the most developed, rigid and protective regulations, especially where the income related thereto is important in relation to farming income as a whole. Products with relatively less economic importance were treated more flexibly, while products of little economic significance to the Community as a whole, but which were important locally, may have included internal financial support measures.¹²⁶

Wine	Council Regulation 822/87	(OJ L No.84/1);
Milk Products	Council Regulation 804/68	(OJ L No.148/13);
Beef and Veal	Council Regulation 805/68	(OJ L No.148/24);
Rice	Council Regulation 1418/76	(OJ L No.166/1);
Oils and Fats	Council Regulation 136/66	(OJ L No.1966/3025);
Sugar	Council Regulation 1785/81	(OJ L No.177/4);
Flowers and Live Plants	Council Regulation 234/68	(OJ L No.55/1);
Processed Food and Vegetables	Council Regulation 516/77	(OJ L 73/1);
Raw Tobacco	Council Regulation 2075/92	(OJ L No.215/70);
Hops	Council Regulation 1696/71	(OJ L No.175/1);
Fibre Flax and Hemp	Council Regulation 1673/2000	(OJ L 193, 29/7/2000, p.6);
Dehydrated Fodders	Council Regulation 603/95	(OJ L 63, 21/3/95, p.1);
Seeds	Council Regulation 2358/71	(OJ L No.246/1);
Sheep meat and Goat Meat	Council Regulation 3013/89	(OJ L 289, 7/10/89, p.1);
Fishery Products	Council Regulation 101/76	(OJ L No.289, 7/10/89, p.1);
Bananas	Council Regulation 404/93	(OJ L No.47, 25/2/93, p.1);
Certain Annex 2 products	Council Regulation 827/68	(OJ L No.151, 30/6/68, p.16).
SPECIAL MEASURES (re production aids)		
Peas and Beans	Council Regulation 1431/82	(OJ L No.162/28);
Linseed	Council Regulation 569/76	(OJ L No.67/29);
Soya beans, rape seed, colza seed and sunflower seed	Council Regulation 3766/91	(OJ L No.356, 24/12/1991, p.17);
Silkworms	Council Regulation 845/72	(OJ L No.100/1).

¹²⁵ Case 36/70 *Getreide Import* [1970] ECR 1107.

¹²⁶ Melchor, Michael; *European Perspectives: 30 years of Community Law*, Commission of the European Communities, 1983, at page 443.

Financial support of agricultural products emanated from one of three funds,¹²⁷ the European Development Fund,¹²⁸ the European Investment Bank, or more commonly, from the Agricultural Guarantee and Guidance Fund.¹²⁹

Historically, the basic regulation on financing of the Common Agricultural Policy was Council Regulation 729/70,¹³⁰ which confirmed the European Agricultural Guarantee and Guidance Fund, which was established by Council Regulation 25/62.¹³¹ This fund was separated into two sections:

1. Guarantee spending, originally without, but now subject to budget limits, and is sometimes applied on a co-financing basis;
2. Guidance operations, mainly used for investment projects, but limited to specific amounts.

The Guarantee section was subdivided into two;

1. Export refunds,
2. Interventions intended to stabilise agricultural markets, to include all internal market measures under the common market organisations. These included first category interventions, i.e. amounts per weight. These were nearly all aids or premiums, and were totally financed by the community. Second category interventions included purchasing and storage operations. This expenditure was usually expressed in the form of a price. As these products may have later been sold the expenditure is the sale price less the purchase price and processing and storage price.¹³² The EAGGF was the main instrument for providing stability and support for agriculture in the Community, and for financing the structural changes deemed necessary to improve the agriculture sector. This fund was specifically charged with aiding structural improvement in agriculture, reducing surpluses by

¹²⁷ Andrews, Sanley; *Agriculture and the Common Market*, Ames, Iowa: Iowa State U.P. 1973, ISBN 0813800307, at page 79.

¹²⁸ This fund is more commonly used for development projects in third countries.

¹²⁹ The EAGGF, or using its more common French acronym, FEOGA.

¹³⁰ [1970] OJ L No.94/13.

¹³¹ OJ No.1962/992.

¹³² Barents, René; *The agricultural law of the EC: an inquiry into the administrative law of the European Community in the field of agriculture*, Deventer: Kluwer, 1994, ISBN 9065448675, at page 366 et seq.

subsidising exports to 3rd countries, and intervening in local markets by purchase when the price of products fell below the support level. The framework for funding until the mid-term review was pursuant to Regulation 1260/1999,¹³³ which will be discussed further later in this chapter, with an analysis of the post-mid-term review situation to follow towards the end of this chapter.

4.1 The Mac Sharry Reforms.

The European Commission itself described changes in the CAP during the Mac Sharry reforms, as an effort to “separate more clearly two aspects of agricultural policy; that of economic efficiency, and that of social and environmental measures.”¹³⁴ This approach was to be further developed by the 1999 reforms, and refined in the mid-term review of the CAP. Earlier moves in this direction were the Less Favoured Areas initiative in 1975,¹³⁵ and the Environmentally Sensitive Areas (ESA) programmes,¹³⁶ which together constituted, in 1993, approximately 1% of the total UK agricultural budget.¹³⁷

The main effects of the 1992 “Mac Sharry” CAP reforms were;¹³⁸

1. a reduction of intervention prices,¹³⁹ thus making the agricultural sector more, though as yet not fully, exposed, to the cold winds of the market place, and,
2. the introduction of new direct payments, to include compensation through direct area payments,¹⁴⁰ subject to 15% rotational set-aside (in 1993 non-

¹³³ OJ 1999 L161/1.

¹³⁴ EC Agricultural Policy for the 21st Century, European Economy: European Commission Directorate General for Economic and Financial Affairs, Reports and Studies No.4 1994, at page 2.

¹³⁵ Directive on Mountain and Hill Farming in certain Less Favoured Areas, 75/268, OJ 1975, L128/18 (19 May 1975).

¹³⁶ Council Regulation 797/85 on Improving the Efficiency of Agricultural Structures, Official Journal, 28, L93 (30 March 1985) 1-18.

¹³⁷ Wathern P.; “Less Favoured and Environmentally Sensitive areas : a European dimension to the rural environment”, chapter 9 in Howarth, William and Rodgers, Christopher P. (eds); Agriculture, Conservation and Land Use: Law and Policy Issues for Rural Areas, University of Wales Press, Cardiff, 1993, at page 187, quoting from “Ministry of Agriculture, Fisheries and Food, Agriculture in the UK” 1988, HMSO, 1989.

¹³⁸ Op. cit. footnote no. 134 at page 18 et. seq.

¹³⁹ 1/3 reduction in the cereal intervention price, 15% reduction in Beef, and the elimination of price support for oilseeds and protein crops.

rotational set aside, at 18 or 21%, was introduced on an optional basis) for arable crops grown by all except small farmers, and an increase in the male bovine and suckler (beef) cow premiums subject to individual limits per holding and to regional reference herds sizes.¹⁴¹

The most novel aspects of the 1992 reforms were the “accompanying measures”, which for the most part were 50% funded (75% funded in Objective 1 regions) from the CAP budget. These “accompanying measures” were a myriad of provisions to include substantial funding of schemes to develop the disadvantaged areas of the European Union. Europe had been divided into objective areas under Article 8 of Regulation (EEC) No. 4256/88,¹⁴² with funding for the resulting Regional policy being found under the European Regional Development Fund (ERDF),¹⁴³ the European Social Fund, the Guidance Section of the EAGGF,¹⁴⁴ and the Cohesion Fund.¹⁴⁵ The LEADER programme started at this time,¹⁴⁶ which was soon followed by LEADER II,¹⁴⁷ and later LEADER+, with a view to developing a “Rural Europe”.¹⁴⁸ The Regional Policy structure was altered during

¹⁴⁰ based on historical base areas and regional yields.

¹⁴¹ There were also extra “extensification” headage premiums if a producer reduced the stocking rate below 1.4 LU per fodder hectare.

¹⁴² Objective 1; regions whose development is lagging behind; Objective 2; industrial regions in decline; Objective 3; combating long term unemployment; Objective 4; adapting workers to industrial change; Objective 5(a); agricultural structures in all regions; (Objective 5a provisions are often called “horizontal structural measures”, as the entire Community is eligible. These provisions are exclusively financed by the EAGGF Guidance Section. Funding varied.), Objective 5b; rural development in certain limited areas; and Objective 6; Nordic regions, following the accession of the new member states.

¹⁴³ Currently operating under Council Regulation (EC) No. 1260/1999, laying down general provisions on the structural funds, OJ L 213, 13 August 1999.

¹⁴⁴ In the fisheries sector, the Fisheries Guidance fund was also available.

¹⁴⁵ Council Regulation (EC) No. 1260/99, laying down general provisions on the structural funds, OJ L 213, 13 August 1999.

¹⁴⁶ The original LEADER scheme was instigated pursuant to Article 8 Reg. (EEC) No 4256/88, OJ L 374, 31/12/88, p. 25, DGVI Financing of the Common Agricultural Policy.

¹⁴⁷ whose objectives were 1. to ensure that support for exemplary local initiatives involving local development continues from Leader; 2. to support operations that are innovative, suitable as a model and transferable, and that illustrate the new directions that rural development may take; 3. to encourage the exchange of experiences and the transfer for know-how through a European rural development network; 4. to encourage transnational co-operation projects developed by the local bodies in rural areas which reflect their solidarity. See <http://www.rural-europe.acidl.be/>.

¹⁴⁸ See further <http://www.rural-europe.acidl.be/>.

the 1999 reforms¹⁴⁹ when it was amended to cover three objective areas¹⁵⁰ and four community initiatives.¹⁵¹ Pre-accession agricultural and rural development schemes, for central and eastern European countries were covered by SAPARD,¹⁵² which provides structural adjustment of agricultural sectors in rural areas, in addition to the more mainstream PHARE scheme, which deals with infrastructure investment generally, and the ISPA¹⁵³ scheme, which deals with environmental and transport structures.¹⁵⁴ These were used by the then accession countries to assist in reforming the domestic agricultural structures prior to membership of the EU, and participation in the CAP.

Agri-development schemes were also developed under the Mac Sharry reforms, with the objective of encouraging more extensive, as opposed to intensive, means of production and to encourage the use of land for “natural resource protection and public leisure”, which included the “Community aid scheme for agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside”.¹⁵⁵ This scheme had many objectives, amongst them the reduction of the polluting effects of agriculture, the extensification of farming, the general improvement of the environment, the encouragement of the upkeep of abandoned farmlands and woodlands, the long term set-aside of land for environmental purposes, the encouragement of public access to land for leisure activities, and finally, the

¹⁴⁹ Op. cit. footnote no. 145.

¹⁵⁰ Objective 1; Development and structural adjustment of regions whose development is lagging behind, on the basis that their per capita GDP was less than 75% of the Community average, (135.0 Billion Euro), Objective 2, Economic and social conversion of areas facing structural difficulties (22.5 Billion Euro), and Objective 3; Adaptation and modernisation of national policies and systems of education and training and employment (24.05 Billion Euro).

¹⁵¹ Interreg III, covering cross-border, transitional and inter-regional co-operation, Urban, regeneration of urban areas in crisis, Leader+ rural development by local action groups, and Equal, to cover transnational co-operation to fight against discrimination and inequality in access to work; Article 20.1 1260/1999.

¹⁵² Special Accession Programme for Agriculture and Rural Development.

¹⁵³ Instrument for Structural Policies for pre-Accession, which operates like the EC's Cohesion fund for existing EC member states.

¹⁵⁴ There are separate aid arrangements for Cyprus and Malta.

¹⁵⁵ <http://www.rural-europe.aeidl.be/rural-en/euro/1112.htm>.

education and training of farmers so as to enable them to comply with the above requirements.

A scheme of aid for forestry investment and management, to include a scheme of compensation for income loss for up to 20 years, which included the “Community aid scheme for forestry measures in agriculture”,¹⁵⁶ was introduced contemporaneously. This latter scheme had as its objective the conversion of agricultural land to forestry. It did not, however, include the growth of Christmas trees, which had become a popular pursuit in some Member States. A system of protection against forest fires was also introduced.¹⁵⁷

The ageing population of farmers throughout the European Union had also been recognised as an obstacle to the preparation of the farming community for globalisation influences of the then anticipated WTO Agreement on Agriculture of 1994, and any subsequent developments. The encouragement of the transfer of farms to the next generation had been seen as a primary objective, with various forms of compensation for early retirement¹⁵⁸ being introduced. These included lump sum or annual payments, for farmers and farm workers over 55, together with aid for young farmers generally,¹⁵⁹ aid in vocational training,¹⁶⁰ and other forms of further education.¹⁶¹ Measures to cover the management costs of young

¹⁵⁶ Regulation No 2080/92, of 30/6/92, OJ L 215 of 30/7/92, and Regulation No 1054/94 of 5/5/94, OJ L 115 of 6/5/94, which organises financial control.

¹⁵⁷ Regulation No 2158/92 of 23.7.92 (OJ L 217 of 31/7/92), Regulation No 1170/93 of 13/5/1993 (OJ L 118 of 4/5/93), Regulation No 804/94 of 11/4/1994 (OJ L 93 of 12/4/94).

¹⁵⁸ Regulation No 2079/92 of 30/6/92, OJ L 215 of 30/7/1992.

¹⁵⁹ “Objective 5a: aid for young farmers”. The purpose of this aid for the takeover of pre-existing movable and immovable assets, during the course of setting up of a young farmer. 25,000 young farmers benefit each year. Total available aid ECU 30,000 (all member states except the UK and the Netherlands).

¹⁶⁰ Used for courses to set up young people in agricultural holdings Max ECU 10,500 per person, of which ECU 4,000 for courses on the environment, forestry and reorientation of production, and granted only once in a lifetime. (All member states except UK have introduced national implementation measures).

¹⁶¹ Article 28 of Regulation No 2328/91 of 15/7/91 (OJ L 218 of 6/8/91) amended by Regulation 3669/93 (OJ L 338 of 31/12/93) and Regulation 2843/94 (OJ L 302 of 25/11/94).

farmers during the first five years of operation were also covered¹⁶² where the level of aid could have been quite high. This approach would be echoed in the later 1999 reforms, pursuant to Agenda 2000.

Special provisions had also been allowed for the particular difficulties facing farmers in mountainous regions, hill farms and less favoured areas.¹⁶³ Two types of aid were applicable in these areas; 1. compensation for permanent natural handicaps, and 2. joint investment aid. New management tools were also provided for under these provisions, and aid for accounting on agricultural holdings¹⁶⁴ had also been provided.¹⁶⁵ General upgrading of market managing mechanisms¹⁶⁶ in pursuit of the reform of the CAP had been grouped in the Objective 5a category of the Structural Fund budget, and primarily concerned the improvement of production conditions, processing and marketing of agricultural and forestry products.

Investment aid in agricultural holdings¹⁶⁷ was also available, where funding in general could have amounted to 25% of the cost of improving competitiveness of a holding, in the context of rational and sustainable development of agricultural production while protecting the income of farmers. These payments rose to 50% in disadvantaged areas of Spain and Italy, and up to

¹⁶² Objective 5a: launching aid for mutual aid, replacement and management services. Articles 14 to 16 of Regulation No 2328/91 of 15/7/91 (OJ L 218 of 6.8.91) amended by Regulation 3669/93 (OJ L 338 of 31.12.93) and Regulation 2843/94 (OJ L 302 of 25/11/94).

¹⁶³ Directive 75/268/EEC of 28/4/75 (OJ L 128 of 19.5.75), Article 17 to 20 of Regulation No 2328/91 of 15/7/91 (OJ L 218 of 6.8.91) amended by Regulation No 2328/91 of 15/7/91 (OJ L 218 of 6.8.91) amended by Regulations 3669/93 (OJ L 338 of 31.12.93) and 2843/94 (OJ L 302 of 25.11.94).

¹⁶⁴ Article 13 of Regulation No 2328/91 of 15/7/91 OJ L 218 of 6/8/91) amended by Regulation No. 2843/91 (OJ L 302 of 25/11/94).

¹⁶⁵ Aid can vary from 700 to 1500 ECU. All Member States except Germany, Ireland, Luxembourg, the Netherlands and the UK have adopted national implementing provisions.

¹⁶⁶ Regulation No 2085 of the 20/7/93 amending Regulation No 4256/88 on the implementation provisions of Regulation 2052/88 with regard to the European Agricultural Guidance and Guarantee Fund (EAGGF) Guidance Section, OJ L 193, p. 44. Regulation No 1282/94 of 2/6/94 laying down the rates of Community co-funding for certain measures of Objective 5a, OJ L 140, p. 14.

¹⁶⁷ Articles 5 to 9, 11 and 12 of Regulation No 2328/91 of 15/7/91 (OJ L 218 of 6.8.91) amended by Regulations 3669/93 (OJ L 338 of 31.12.93) and 2843/94 (OJ L 302 of 25/11/94).

75% in Objective 1 areas. This funding was not limited to full time farmers.

Funding could have included:

1. the construction of farm buildings,
2. the relocation of farm buildings when this is done in public interest,
3. land improvement operations,
4. environmental protection and improvement,
5. and on condition that this aid is granted in compliance with the general rules of competition.¹⁶⁸

Not only was the production of agricultural produce the concern of the European Union, so also was the processing and marketing of that produce,¹⁶⁹ with the objective being to relieve the intervention agencies. Marketing of produce was recognised as being of primary importance,¹⁷⁰ with the creation of a system to encourage the formation of producer groups and their unions.¹⁷¹ Aid could have varied from 2 to 5% of value of market production, to a maximum of ECU 120,000.

Adding value to agricultural produce was seen as a way of increasing farm incomes through the market either through the encouragement of the growth of organic produce,¹⁷² by creating conditions of fair competition, or through the new

¹⁶⁸ The UK ceased operating this scheme in 1995.

¹⁶⁹ Regulation No 866/90 of 29/3/90 (OJ L 91 of 6/4/90) amended by Regulation 3669/93 (OJ L 388 of 31/12/93) and Regulation 2843/94 (OJ L 302 of 25/11/94). (This regulation replaces Regulation No 355/77 which concerned the Community aid scheme for investments in the field of processing and marketing agricultural and fisheries products).

¹⁷⁰ Objective 5a: launching aid for producer groups for marketing agricultural products; countries partaking in this scheme are Belgium, France, Spain, Greece, Ireland, Italy and Portugal.

¹⁷¹ Regulation No 1360/78 of 19/6/78 (OJ L 166 of 23.6.78) amended by Council Regulation 1760/87, OJ L 167, p. 1, Council Regulation 3875/88, OJ L 346 of 15.12.88), Regulation 3808/89, (OJ L 370 of 20.12.89) Regulation 3763/91, (OJ L 356 of 24.12.91), Regulation 698/93 (OJ L 74 of 27.3.93), Regulation 3669/93, (OJ L 338 of 31.12.93). In addition specific systems have been set up for the sector of fruit and vegetables, (Regulation No 1035/72 of 18/5/72 OJ L 118 of 20/5/72), for cotton (Regulation No 389/82 of 15.12.82 OJ L 51 of 23/2/82) and for hops (Regulation No. 1696/71 of 26/7/91 OJ L 175 of 4/8/71).

¹⁷² Regulation No 2092/91 of 24/6/91 (OJ L 198 of 22/7/91) amended by Regulation 94/92 (OJ L 11 of 17/1/92), Regulation 1535/92 (OJ L 162 of 16/6/92), Regulation 2083/92 (OJ L 208 of 24/7/92), Regulation 3457/92 (OJ L 350 of 1/12/92), Regulation 3713/92 (OJ L 378 of 23/12/92), Regulation 2608/93 (OJ L 239 of 24/9/93), Regulation 468/94 (OJ L 59 of 3/3/94), Regulation 1468/94 (OJ L 159 of 28/6/94), Regulation 2381/91 (OJ L 255 of 1/10/94), Regulation 529/95 (OJ

Community system of the designation of origin and geographical indication,¹⁷³ (of which more in chapters 8 and 9) or the Community system for the protection of agri-food products benefiting from a certificate of specific character.¹⁷⁴ Public agencies and private bodies were targeted under Article 8 of the EAGGF Guidance Section.¹⁷⁵ This funding was designed to facilitate “pilot projects and demonstration projects relating to the adjustment of agricultural structure and the promotion of rural development”.¹⁷⁶

With the European Community pouring all this money into agricultural schemes it was concerned that national initiatives would not unbalance its finely tuned aid package, and restrictions on national aid for investment in agricultural holdings has also been provided for.¹⁷⁷ The informing of the European Citizen and the co-ordination of the various European rural initiatives was to be carried out by “European Rural Information and Promotion Carrefours”.¹⁷⁸ Processing and marketing structures were also encouraged and funded,¹⁷⁹ to encourage the development of new and higher quality products, to include organic products.

L 54 of 10/3/95), Regulation 1201/95 (OJ L 119 of 30/5/95), Regulation 1202/95 (OJ L 119 of 30/5/95), Regulation 1935/95, (OJ L 185 of 5/8/95). A list of bodies providing certification for the purpose of organic production is published in the OJ (OJ C 284 of October 1993).

¹⁷³ Regulation No 2081/92 of 14/7/92 (OJ L 208 of 24/7/92), Regulation No 1848/93 of 9/7/93 (OJ L 168 of 10/7/93), Decision No 53/93 of 21/12/92 (OJ L 13 of 21/1/93), Decision No 437/94 of 14/6/94 (OJ C 273 of 9/10/93). Communication from the Commission (OJ C273 of 9/10/93), completed by Regulation No 2037/93, OJ L. 185, 28/7/93, p. 5.

¹⁷⁴ Regulation No 2082/92 of 14/7/92 Relating to certificates of specific character of agricultural products and foodstuffs amended by Regulation 1848/93, OJ L 169, 10/7/93, at page 35, and Regulation 2515/94, OJ L275, 26/10/94, p. 1.

¹⁷⁵ Article 8 of Regulation No 2085/93 of 20/7/93 amending Regulation no 4256/88 (OJ L 193 of 31/7/93). Article 8 regards the application of Regulation No 2052/88 (relating to the missions of the EAGGF Guidance Section), Article 3 paragraph 3 sub-section 2 and Article 5 paragraph 2 point 3 OJ L 185 of 15/7/88.

¹⁷⁶ Community contributions may be up to 75% of the cost of the project for Objective 1 regions and 50% for the other regions.

¹⁷⁷ Article 12 of Regulation No 2328/91 of 15/7/91 (OJ L 218 of 6/8/91) amended by Regulations 3669/93 (OJ L 338 of 31.12.93) and 2843/94 (OJ L 302 of 25.11.94).

¹⁷⁸ Established following the Communication of the Commission of the European Communities, “The Future of Rural Society”, published in 1988 (COM(88)5012 Final), implemented following Communication SEC(89)1717 final of 13/10/89 relating to the guidelines of rural development actions.

¹⁷⁹ Op. cit. footnote no. 169.

This financing was aimed at persons or bodies who were ultimately responsible for the financing of and investment in these schemes.¹⁸⁰

5. 1999 reforms

The CAP underwent further reform pursuant to Agenda 2000,¹⁸¹ which was a Commission proposal of July 1997, which was adopted by the Berlin European Council in March 1999. Agenda 2000 had as its aim, in line with undertakings given in the WTO Agreement on Agriculture, and with the view to the subsequent WTO agricultural negotiations, the reduction of "guaranteed prices", which were to be compensated by an increase in direct support to farmers".¹⁸² This was to be complimented by measures to promote the "adaptation of rural areas in so far as these are related to farming activities and their conversion"¹⁸³ together with the creation of "a comprehensive and consistent rural development policy".¹⁸⁴ It could be argued that the CAP, allied with the Regional policy, and the operation of the LEADER and LEADER II schemes had already made efforts in this direction, however, Agenda 2000 had repositioned these activities to the fore, within the overall CAP strategy. In addition to redesigning the CAP into a two pillar structure, Agenda 2000 emphasised the need for "action on the environment" to "be substantially reinforced",¹⁸⁵ thereby furthering the

¹⁸⁰ eligible investments:

1. the construction and acquisition of immovable property with the exception of land purchase
2. new machinery and equipment, including computer software and programmes
3. general costs (architects' , consultants fees, feasibility studies) up to a ceiling of 12% of the cost referred to in the last two items.

generally speaking, the investment must concern Annex 2 products or fishery products.

EU Contribution: The financial contribution from the EAGGF guidance Section may not exceed 50% of the eligible costs in the regions covered by objective 1 and 30% in other regions. Aid generally takes the form of capital grants. All member states have introduced implementing legislation.

¹⁸¹ AGENDA 2000 <http://www.europa.eu.int/scadplus/leg/en/lvb/l04000.htm>, 1997, Cat. CB-CO 97-379-EN.C.

¹⁸² European Parliament Briefing No. 27; Agriculture and Enlargement, DOC EN/EV/360/360464.

¹⁸³ AGENDA 2000; the future of European Agriculture: Explanatory Memorandum, European Commission, 1997, CH-87-98-001-EC-C, at page 13.

¹⁸⁴ Ibid. at page 3.

¹⁸⁵ Ibid. at page 3.

move from a prices policy to a structural policy earlier referred to in this chapter. Food quality and safety were also made a priority, with the overall objective of Agenda 2000 being to develop a competitive, sustainable and multi-functional agriculture for the EU.¹⁸⁶

Future agricultural legislation was to be simplified, consolidated, and made available to the public on the internet.¹⁸⁷ For example, rural development provisions were consolidated into a single regulatory framework¹⁸⁸ from "the previous nine regulations".¹⁸⁹ Simplifications also resulted from the "reduction to three of the number of objectives for structural measures".¹⁹⁰ Other simplifications resulted from the "Small Farmers' Scheme" payments structure.¹⁹¹ In line with this process of simplification, the horizontal regulations on import and export licences were consolidated into Commission Regulation (EC) No. 1291/2000,¹⁹² which included much simplification of the rules, which had been called for in Agenda 2000- the future for European Agriculture.¹⁹³ This was to be accompanied by new "Community Guidelines for State aid in the agricultural sector",¹⁹⁴ which were complimented by the EC's own regulations; Council Regulation (EC) No. 1259/1999 of 17 May 1999 establishing common rules for direct support schemes under the Common Agricultural Policy,¹⁹⁵ and Council Regulation (EC) No. 1244/2001 of 19 June 2001, amending Regulation

¹⁸⁶ Ibid. at page 5.

¹⁸⁷ Report from the Commission to the European Parliament and the Council on Simplification of Agricultural Legislation, Brussels, 29.01.2001 COM (2001) 48 Final, at page 1 et seq.

¹⁸⁸ Council Regulation (EC) No 1257/1999 on support for rural development from the European Agricultural guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations OJ L 160, 26/6/99, p.80; Commission Regulation (EC) No 1750/1999 of 23 July 1999 laying down detailed rules for the application of Council Regulation (EC) No 1257/1999 on support for rural development from the EAGGF, OJ L 214, 13/8/99. p. 31; Commission Regulation (EC) No 2603/1999 of 9 December 1999 laying down rules for the transition to the rural development support provided for by Council Regulation (EC) No 1257/1999, OJ L 316, 10/12/1999, p. 26.

¹⁸⁹ Op. cit. footnote no. 187, at page 3.

¹⁹⁰ Ibid. at page 3.

¹⁹¹ Ibid. at page 4.

¹⁹² OJ L. 152, 24/6/2000, page. 1.

¹⁹³ Op. cit. footnote no. 183 at page 2.

¹⁹⁴ OJ C 28, 1.1.2000, p.2; OJ C 232, 12.8.2000, p.19.

¹⁹⁵ OJ L. 160, 26/6/1999, page 113.

1259/1999 establishing common rules for direct support schemes under the common agricultural policy, for farmers receiving small amounts of money.¹⁹⁶

The guidelines on state aids, which came into force on the 1st January, 2000, provided that certain state aids would be approved subject to certain conditions. These approved state aids included investment aid for farms,¹⁹⁷ with higher level of aids being available for "investments linked to the conservation of traditional landscapes, for the relocation of farm buildings in the public interest or for the improvement of the environment, animal welfare or hygiene".¹⁹⁸ Aid was approved for "investment in the processing and marketing of agricultural products",¹⁹⁹ as were state aids to support agri-environmental undertakings.²⁰⁰ Aid was also approved to compensate for less-favoured areas,²⁰¹ to help young farmers start up,²⁰² to assist in early retirement schemes, or to reduce production, processing or marketing capacity. Also included was aid to help producer groups start up, to compensate for loss arising from natural disasters, adverse weather conditions or disease, or aid towards insurance against these risks, or aid to improve marketing of goods, or the genetic quality of livestock, or aid for "the outermost regions and the Aegean islands."²⁰³ Specifically, Article 33 of Council Regulation (EC) No. 1257/1999²⁰⁴ provided support for the promotion and adaptation and development of rural areas, to include "land improvement, reparcelling, setting-up of farm relief and farm management services", the marketing of quality agricultural products, the provision of basic services to rural areas, "renovation and development of villages and protection and conservation of the rural heritage", the "diversification of agricultural activities and activities close to agriculture to provide multiple activities or alternative incomes", and "the

¹⁹⁶ OJ L 1973, 27.6.2001, page.1, second recital.

¹⁹⁷ Op. cit. footnote no. 51, at Article 4.

¹⁹⁸ Op. cit. footnote no. 5, at paragraph 78.

¹⁹⁹ Ibid.

²⁰⁰ Op. cit. footnote no. 51, at Article 22.

²⁰¹ Introduced by Council Regulation (EC) No. 1257/1999 OJ L. 106, 26/6/1999, p.80, Article 22.

²⁰² Ibid at Article 8.

²⁰³ Op. cit. footnote no. 5, at paragraph 78.

²⁰⁴ Op. cit. footnote no. 51.

encouragement of tourist and craft activities".²⁰⁵ Common rules for direct support schemes set out in 1999,²⁰⁶ were amended in 2001.²⁰⁷ The Structural funds had been dealt with by Regulation 1260/1999,²⁰⁸ which had provided that Objective 1 funding was to be covered by the ERDF, the ESF, the EAGGF Guidance section and, where appropriate, the FIFG,²⁰⁹ Objective 2 funding from the ERDF and the ESF, and Objective 3 from the ESF.²¹⁰ The financing of the four community initiatives was also provided for in Regulation 1260/1999. INTERREG and URBAN were both to be financed by the ERDF, Leader was to be financed by the EAGGF Guidance Section, and EQUAL by the ESF.²¹¹

The reduction in guaranteed prices aspect of the reform was reflected in the reduction of the intervention price for cereals by 20% in 2000, with direct aid to farmers on the basis of production increased from ECU 54 per tonne to ECU 65 per tonne.²¹² In the Beef and veal common organisation, support was to be reduced by 30% in three equal phases, with the then existing intervention system being replaced by a private storage system. In like manner, the intervention prices for butter and skimmed milk powder was reduced by 15% in four phases, with similar provision being made for other agricultural products.²¹³

²⁰⁵ Ibid.

²⁰⁶ Council Regulation (EC) No 1259/1999 of 17 May 1999 establishing common rules for direct support schemes under the common agricultural policy. Official Journal L 160, 26/06/1999 p. 113.

²⁰⁷ Council Regulation (EC) No 1244/2001 of 19 June 2001 amending Regulation (EC) No 1259/1999 establishing common rules for direct support schemes under the common agricultural policy, Official Journal L 173, 27/06/2001 p. 1.

²⁰⁸ Op. cit. footnote no. 145.

²⁰⁹ The Financial Instrument for Fisheries Guidance, which is to "contribute to structural actions in the fisheries sector Objective 1 regions in accordance with Council Regulation (EC) No 1263/1999 June 1999 on the financial instrument for fisheries guidance" Article 2.3 Regulation 1260/1999.

²¹⁰ Article 2.2 Regulation 1260/1999.

²¹¹ Recital no. 38 of Regulation 1260/1999.

²¹² Op. cit. footnote no. 5, at paragraph 74.

²¹³ Ibid. at paragraph 24 et seq.

6. The Mid-term review

The recent mid-term review of the CAP, arising from “a seemingly innocuous commitment in the Berlin agreement” has resulted in “the most far-reaching policy reforms since 1992”,²¹⁴ which should act as an important milestone for the CAP and for the Community.²¹⁵ These reforms have been implemented by Council Regulation (EC) No 1782/2003,²¹⁶ which resulted in the introduction of the single farm payment (SFP) being substituted for many of the existing premia under the various common market organisations as and from January 2005, of which more discussion in chapter 8. In addition a number of common organisations were reformed, to include dried fodder,²¹⁷ milk and milk products,²¹⁸ with additional reform provisions dealing with the milk quota,²¹⁹ cereals,²²⁰ and rice.²²¹ Further reforms in Mediterranean products were instigated

²¹⁴ Op. cit. footnote no. 41, at page 112.

²¹⁵ Op. cit. footnote no. 39, at page 19.

²¹⁶ Op. cit. footnote no. 24.

²¹⁷ Council Regulation (EC) No 1786/2003 of 29 September 2003 on the common organisation of the market in dried fodder, which was subsequently amended by the Acts concerning the accession to the EU of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic, 01.05.2004 Official Journal L 236 of 23.09.2003.

²¹⁸ Council Regulation (EC) No 1255/1999 of 17 May 1999 on the common organisation of the market in milk and milk products, OJ L 160 of 26.6.1999, which has since been amended by Regulation (EC) No 1040/2000, OJ L 118 of 17.5.2000, Regulation (EC) No 1526/2000, OJ L 142, p. 35, Regulation (EC) No 1670/2000, OJ L 193, p. 10, Regulation (EC) No 509/2002, OJ L 79 of 22.3.2002, Acts concerning the Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Republic of Slovakia to the EU, OJ L 236 of 23.9.2003, Regulation (EC) No 1787/2003, OJ L 270 of 29.9.2003, Regulation (EC) No 186/2004, OJ L 29 of 3.2.2004. These provisions were supported by extensive implementation measures, covering export refunds, refund rates, minimum prices, selling prices, and maximum amounts.

²¹⁹ Council Regulation (EC) No 1788/2003 of 29 September 2003 establishing a levy in the milk and milk products sector, OJ L 270 of 21.10.2003, which is supplemented by Commission Regulation (EC) No 595/2004 of 30 March 2004 laying down detailed rules for applying Council Regulation (EC) No 1788/2003 establishing a levy in the milk and milk products sector (repealing Commission Regulation (EC) No 1392/2001), OJ L 94 of 31.3.2004.

²²⁰ Council Regulation (EC) No 1784/2003, on the common organisation of the market in cereals, Official Journal, L 270 of 21.10.2003, and supplemented by Commission Regulation (EC) No 2237/2003 of 23 December 2003 laying down detailed rules for the application of certain support schemes provided for in Title IV of Council Regulation (EC) No 1782/2003 establishing common

in 2004.²²² For cereals, in addition to reform of the common organisation, pursuant to Council Regulation (EC) No 1784/2003²²³ together with provisions providing for the implementation of provisions to meet the requirements of the newly reformed common organisation,²²⁴ specific provisions were also made dealing with the particular situation of specific accession countries. New provision on food aid²²⁵ and set-aside were also provided for, with revised area aid provisions for cereals also being provided for.²²⁶

rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, OJ L 339 of 24.12.2003.

²²¹ Council Regulation (EC) No 1785/2003 of 29 September 2003, on the common organisation of the market in rice, Official Journal, L 270 of 21.10.2003, and supplemented by Commission Regulation (EC) No 2237/2003 of 23 December 2003 laying down detailed rules for the application of certain support schemes provided for in Title IV of Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, OJ L 339 of 24.12.2003.

²²² to cover olive oil and table olives, hops, tobacco and cotton.

²²³ of 29 September 2003 on the common organisation of the market in cereals, OJ L 270 of 21.10.2003.

²²⁴ Commission Regulation (EC) No 2305/2003 of 29 December 2003 opening and providing for the administration of a Community tariff quota for imports of barley from third countries, OJ L 342 of 30.12.2003, Commission Regulation (EC) No 1342/2003 of 28 July 2003 laying down special detailed rules for the application of the system of import and export licences for cereals and rice, OJ L 189 of 29.7.2003. Commission Regulation (EC) No 500/2003 of 19 March 2003 on the periods for which certain cereal and rice products may remain under customs control arrangements for the advance payment of refunds, OJ L 74 of 20.3.2003. Commission Regulation (EC) No 2377/2002 of 27 December 2002 opening and providing for the administration of a Community tariff quota for malting barley from third countries and derogating from Council Regulation (EC) No 1766/92 OJ L 358 of 31.12.2002. Last amended by Regulation (EC) No 626/2003, OJ L 90 of 8.4.2003. Extended by Regulation (EC) No 1112/2003, OJ L 158 of 27.6.2003. Commission Regulation (EC) No 2375/2002 of 27 December 2002 opening and providing for the administration of Community tariff quotas for common wheat of a quality other than high quality from third countries and derogating from Council Regulation (EEC) No 1766/92, OJ L 358 of 31.12.2002. Last amended by Regulation (EC) No 532/2003, OJ 26.3.2003. Extended by Regulation (EC) No 1111/2003, OJ L 158 of 27.6.2003. Commission Regulation (EC) No 2133/2001 of 30 October 2001 opening and providing for the administration of certain Community tariff quotas and tariff ceilings in the cereals sector and repealing Regulations (EC) No 1897/94, (EC) No 306/96, (EC) No 1827/96, (EC) No 1970/96, (EC) No 1405/97, (EC) No 1406/97, (EC) No 2492/98, (EC) No 2809/98 and (EC) No 778/1999, OJ L 287 of 31.10.2001. Commission Regulation (EC) No 824/2000 of 19 April 2000 establishing procedures for the taking-over of cereals by intervention agencies and laying down methods of analysis for determining the quality of cereals, OJ L 100 of 20.4.2000, most recently amended by Regulation (EC) No 336/2003, OJ L 49 of 22.2.2003. Commission Regulation (EC) No 2461/1999 of 19 November 1999 laying down detailed rules for the application of Council Regulation (EC) No 1251/1999 as regards the use of land set aside for the production of raw materials for the manufacture within the Community of products not primarily intended for human or animal consumption, OJ L 299 of 20.11.1999. Last amended by Regulation (EC) No 345/2002, OJ L 55 of 26.2.2002.

²²⁵ Commission Regulation (EC) No 1647/2002 of 16 September 2002 on the supply of cereals as food aid, OJ L 249 of 17.9.2002. Commission Regulation (EC) No 2298/2001 of 26 November

7. An examination of the Cereals Common Market from before the Mac Sharry reforms to after the mid-term review

An example of one of the more developed market organisations is that of Cereals,²²⁷ which was set up against the backdrop of the International Wheat Agreement.²²⁸ Its objective was to have a single price system for cereals for the community, but maintaining a flexibility to vary target prices, intervention prices and threshold prices a number of times a month, if necessary.²²⁹ In the market for cereals²³⁰ a target price, and threshold price and intervention price were set for "a standard quality" of each cereal.²³¹ How these prices were used differs between the regulations. A threshold price was also provided for under both the 1975 and 1992 regulations. Under the 1992 regulation the one threshold price was fixed for all cereals,²³² reflecting the inter-changeability of cereals from the point of view of the farmer, with the c.i.f. price continuing to be based on the Rotterdam prices, "on the basis of the most favourable purchasing opportunities on the world market".²³³ A levy was then imposed on imported cereals, equal to the threshold

2001 laying down detailed rules for the export of products supplied as food aid, OJ L 308 of 27.11.2001.

²²⁶ Commission Regulation (EC) No 2316/1999 of 22 October 1999 laying down detailed rules for the application of Council Regulation (EC) No 1251/1999 establishing a support system for producers of certain arable crops, OJ L 280 of 30.10.1999. Last amended by Regulation (EC) No 206/2004, OJ L134 of 6.2.2004.

²²⁷ Pre Mac Sharry reforms Regulation No. 2727/75, [1975] OJ L No.281/1, which consolidated and updated the previous regulations, but which was repealed and replaced by Council Regulation (EEC) No. 1766/92 of 30 June 1992 on the common organisation of the market in cereals, OJ. L. 181, 1.7.92, page 21. The exact products covered by this regulation are set out in Article 1 of both regulations. The 1992 regulation operates in conjunction with Regulation (EEC) No. 1765/92 on assistance for arable farmers, OJ L 280, 24/07/92, p. 34, Article 1.2 of Council Regulation (EEC) No. 1766/92.

²²⁸ See further annex 2.

²²⁹ Article 6 Regulation 2727/75, and Article 3.4 and Article 6 of Council Regulation (EEC) No. 1766/92.

²³⁰ Being common wheat, durum wheat, barley, maize, sorghum and rye.

²³¹ Article 3 Council Regulation (EEC) No. 1766/92.

²³² Article 3.2 Regulation 1766/92.

²³³ Article 10.2 Regulation 1766/92, and Article 13 and 14 of Regulation 2727/75.

price less the c.i.f. price.²³⁴ In addition to the payment of the levy, all imports into the EC, as with all exports from the EC, required a licence.²³⁵ Under Annex I of Council Regulation (EC) No 3290/94,²³⁶ which was enacted in order to implement the WTO Agreement on Agriculture Article 3.2 of Council Regulation (EEC) No. 1766/92 was deleted, thereby bringing to an end the regime of threshold prices in the cereals sector within the EC. An examination of the EC's rules on the import and export of agricultural produce, and the impact of the WTO Agreement on Agriculture, and allied WTO agreements, will be made in Chapter 3, with the EC's WTO commitment being discussed in depth in chapter 4 and subsequent chapters.

The 1992 cereals' regulation was accompanied by Council Regulation (EEC) No. 1765/92,²³⁷ which established a support system for producers of certain arable crops, on the basis of both rotational and non-rotational set aside. Council Regulation (EEC) No. 1765/92 has since been repealed and replaced by Council Regulation (EC) No 1251/1999.²³⁸ Council Regulation 1251/1999 provided a support mechanism for producers of certain arable crops. It provided in recital no. 7 that "reform of the support scheme has to take into account the international obligations of the community", namely the WTO Agreement on Agriculture obligations.

The reform of the cereals organisation under the mid-term review was conducted pursuant to Council Regulation (EC) No. 1784/2003,²³⁹ against the

²³⁴ Article 10.1 Regulation 1766/92, with the exception of Rye, which had its own calculations.

²³⁵ Article 12 Regulation 2727/75 and Article 9 Regulation 1766/92.

²³⁶ Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations, Official Journal L 349, 31/12/1994 p. 105

²³⁷ OJ. L. 181, 1/7/1992, page 12.

²³⁸ Council Regulation (EC) No 1251/1999 of 17 May 1999 establishing a support system for producers of certain arable crops, Official Journal L 160, 26/06/1999 p. 1

²³⁹ Council Regulation (EC) No 1784/2003, on the common organisation of the market in cereals, Official Journal, L 270 of 21.10.2003, and supplemented by Commission Regulation (EC) No 2237/2003 of 23 December 2003 laying down detailed rules for the application of certain support schemes provided for in Title IV of Council Regulation (EC) No 1782/2003 establishing common

back drop of Council Regulation (EC) No. 1782/2003,²⁴⁰ the main mid-term review provisions. For those regions who have not fully decoupled payments, Council Regulation (EC) No 1784/2003 re-sets an intervention price for cereals, with the exception of rye,²⁴¹ which is no longer covered, under its chapter II internal market provisions. The regulation then goes on to provide for “a trading market at the external frontiers of the Community” for cereals,²⁴² with import and export licences, export refunds, import duties, tariff quotas and emergency safeguard measures continuing to form part of the post-mid-term version of the EC cereals common organisation. All of these provisions are to maintain compliance with the EC’s commitments under the WTO Agreement on Agriculture, of which more in chapter 4 of this thesis.

The current WTO Agreement on Agriculture, pursuant to the Uruguay round of negotiations, provides for green box exemptions²⁴³ and blue box exclusions,²⁴⁴ which EC CAP provisions are increasingly mirroring. The Green box provisions permit²⁴⁵ “payments under environmental and regional assistance programmes”.²⁴⁶ Payments under Green Box provisions, must be “generally available to producers within the region”²⁴⁷ and can not be “related to, or based on, the type or volume of production”,²⁴⁸ with the “size of the payment being “limited to the extra costs or loss of income involved in complying” with government programmes,²⁴⁹ thereby limiting the effectiveness of developing green box payments as steering mechanisms in the development of more

rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, OJ L 339 of 24.12.2003.

²⁴⁰ Op. cit. footnote no. 24.

²⁴¹ Recital 5 of Council Regulation 1784/2003 states that rye is to be excluded as there had been a large accumulation of intervention stocks of rye under the previous regime.

²⁴² Recital 8 of Council Regulation 1784/2003

²⁴³ Article 6.1 of the Agreement on Agriculture and Annex 2.

²⁴⁴ Article 6 Agreement on Agriculture.

²⁴⁵ Agreement on Agriculture, Articles 2.2-2.13.

²⁴⁶ Kennedy, Kevin C.; *Reforming Farm Trade in the Next Round of WTO Multilateral Trade Negotiations*, (2001) *Journal of World Trade* 35(6): 1061-1079,

²⁴⁷ Rude, James; *Under the Green Box; the WTO and Farm Subsidies*, (2001) *Journal of World Trade* 35(5); 1015-1033, at page 1027.

²⁴⁸ WTO Agreement on Agriculture, Annex 2, paragraph 6

²⁴⁹ Op. cit footnote no. 247, at page 1027.

sustainable agricultural practices.²⁵⁰ The provisions of the WTO Agreement on Agriculture will be discussed more fully in Chapter 4 of this thesis, with the WTO panel and appellate panel decisions relevant to agriculture being examined in Chapter 5. The interaction of the WTO provisions affecting agriculture, in particular the WTO Agreement on Agriculture, and the EC's CAP provisions will be examined in further depth in Chapters 6 and 7 of this thesis, with the development of the new rural policy of the EC being discussed in chapters 9 and 10.

8. Conclusion

As can be seen from the developments outlined in this chapter, the emphasis of the CAP has changed over the years, with the move from a highly protectionist model to a more market orientated one being the cause of many political crises along the way. The EC's CAP continues to cause controversy, and will undoubtedly continue to do so until such time as agricultural commodities are no longer differentiated from non-agricultural commodities in either the EC's internal market structure, or in the EC's relationship with the rest of the world. Much progress has however already been made in reforming the CAP, with community preference, the first pillar of the CAP, having been repealed by the Amsterdam treaty, and the decoupling of EC payments from production currently being phased in under the recent mid-term review of the CAP. Focusing on cereals, the original target and threshold prices in cereals are now gone, with "the intervention price, on the other hand (being) the only element of the original price structure to survive"²⁵¹ the various reforms, with prices still being guaranteed to producers for regions of the EC not yet implementing the fully decoupled payments under the single farm payment scheme. The CAP has developed over the years, from financial support for production, to intervention, to the current

²⁵⁰ Ibid. at page 1031.

²⁵¹ Usher, John; EC Agricultural Law, 2nd edition, Oxford University Press, 2001, at page 84.

emphasis, the restructuring of agricultural production in the EC,²⁵² with a developing emphasis on producer support and rural development under the current two pillar structure of the CAP.²⁵³ This shift is not as yet complete, and the CAP still suffers from tensions emanating from the original "multifunctional" drafting of its treaty provisions. On the external trade front, "import levies have disappeared, being replaced by customs duties",²⁵⁴ a simplified structure of import and export licences, export refunds, import duties and tariff quotas, together with emergency safeguard measures still exist.

The two terms, "sustainability", as defined by the Brundtland commission,²⁵⁵ and "multifunctionality", which still lack an agreed definition, with the OECD's positive concept of multifunctionality most likely to achieve international recognition,²⁵⁶ are coming to the fore in CAP policy discussions, and are being strongly supported, along with the Commission's policy document Agenda 2000²⁵⁷ package of reforms,²⁵⁸ by the EC and the current round of WTO negotiations.²⁵⁹ European farmers are also adjusting to the "multifunctionality" debate, recognising that they "can serve the cause of conservation, and achieve income of themselves, by making it their business to provide environmental services to the public."²⁶⁰ These developments are recognised not only in EC documentation²⁶¹ but also in the ideas behind the mid-term-review's requirements for obtaining the single farm payment and the accompanying cross compliance requirements.²⁶² These changes are however been driven by the need to meet the EC's legal obligations under the WTO Agreement on Agriculture, which will be

²⁵² Op. cit. footnote no. 6, at page 120.

²⁵³ Op. cit. footnote no. 5, at paragraph 76 et seq.

²⁵⁴ Op. cit. footnote no. 251, at page 84.

²⁵⁵ Op. cit. footnote no. 10, at page 9.

²⁵⁶ Op. cit. footnote no. 54, at page 14.

²⁵⁷ issued on the 16th July 1997.

²⁵⁸ Op. cit. footnote no. 181.

²⁵⁹ Op. cit. footnote no. 17.

²⁶⁰ Gregory, M.; "The Implementation of Agricultural Diversification", in Howarth, William and Rodgers, Christopher P. (eds); *Agriculture, Conservation and Land Use: Law and Policy Issues for Rural Areas*, University of Wales Press, Cardiff, 1993, at page 31.

²⁶¹ Op. cit. footnote no. 19, at page 3.

²⁶² Which are discussed in depth in chapter 8.

discussed in depth in chapter 4, together with the case law of panel and appellate rulings of its dispute settlement system, which will be covered in chapter 5, with the impact of the interaction of the WTO legal system on the EC legal system in the context of agriculture, not only impacting on the law dealing with trade in agricultural commodities and agricultural support, but also in supporting areas of law, such as intellectual property and services, being analysed in subsequent chapters.

Chapter 3

Current legal structure of the import into and export from the EC of agricultural commodities

1. Introduction

2. The Common Commercial Policy

2.1 Opinion 1/94

3. Agricultural Aspects of the Common Commercial Policy

4. Common Customs Code

5. Valuations for customs purposes

6. Rules of Origin

7. Tariff and non-tariff barriers

8. Import Protection post Uruguay

9. Anti-dumping and Export Subsidies

9.1 Audio tapes in cassettes panel

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15. Exceptions:

15.1. Generalised System of Preferences

15.1.5 Post WTO – GSP system of the EC

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16. Conclusion

1. Introduction

Before progressing on to examine the content and operation of the WTO Agreement in agriculture, and in order better to understand the context and operation of the CAP, it is best to take some time out to have an overview of the various provisions which have an impact on the trade into and out of the EC in agricultural commodities. The EC's CAP interacts with the outside world through the EC's Common Commercial Policy (CCP), and its Article 133 EC. In this chapter the operation of the CCP, together with the agricultural aspects of the CCP will be examined. In addition, the operation of the Common Customs Code (CCC) in the context of agricultural commodities has had an impact on the reality of the legal relationship between the EC and the WTO in the area of agriculture. Allied to the customs code and its various procedures are a number of supporting measures, which the WTO disciplines either have or will have an impact upon. These include the valuation of goods for customs purposes, rules of origin, tariff and non-tariff barriers, import protection, and anti-dumping and export subsidies. While export credit insurance is not currently regulated at the WTO level, it is subject to OECD disciplines, thereby interacting with the export refund and currency discourse. All of these are examined in this chapter, from the perspective of trade in agricultural commodities. Also of relevance are the Sanitary and Phytosanitary provisions of the EC, which have counterpart provisions in the WTO agreements, together with the EC mechanism of charging for health inspections. This chapter concludes by examining the major exceptions to the usual external trade rules which the EC currently operates, and which, each of them in their own right, pose problems for the EC-WTO legal relationship. These agreements, namely the Generalised System of Preferences, the current Cotonou agreement and the emerging Euro-Mediterranean agreements are also covered, leading to the conclusion of this chapter.

2. The Common Commercial Policy

The fulcrum through which the EC's Common Agricultural Policy interacts with the WTO Agreement on Agriculture is the EC's Common Commercial Policy (CCP). The CCP is also the mechanism which permitted the EC to accede to the Uruguay Round Final Act and the Agreement Establishing the World Trade Organisation, in 1994. Article 133 (ex. Article 113) EC forms the lynch pin of the CCP,¹ also known as the "external economic policy".² Not only was the article renumbered by the Amsterdam Treaty, but, reflecting the concerns that resulted in the ECJ's ruling in *Opinion 1/94*,³ on the EC's legal capacity to accede to the totality of the WTO agreements, in particular the General Agreement on Trade in Services (GATS) and the Trade Related Aspects of Intellectual Property Rights (TRIPs), a new provision, Article 133.5 was added to deal with the EC's capacity to engage with these issues, albeit on a unanimous vote from the Council, and after consultation with the European Parliament. With the coming into force of the Nice Treaty⁴ a new Article 133 was inserted into the EC treaty, which, inter alia, further refined the Amsterdam amendment. The Amsterdam change was described by the Commission as not being "an extension of the existing CCP provisions, but merely a codification of the current position" and case law to date.⁵ Said "current position" is discussed further in chapter 6. The Nice changes could, however, be deemed to be an extension of the Article 133 competence. This article was originally complemented by Article 116 EC,⁶

¹ Article 131 (ex Article 110) EC to Article 134 (ex Article 115) EC.

² Cremona, Marise: EC External Commercial Policy after Amsterdam: Authority and Interpretation with Interconnected Legal Orders, The EC, the WTO and the NAFTA; in Weiler J.H.H.(Ed.) Towards a Common Law of International Trade, Oxford University Press, 2000, at page 8.

³ *Opinion 1/94 (re WTO Agreement)* [1994] ECR I-5267.

⁴ Signed 26th February 2001, in force from the 1st February 2003.

⁵ Op. Cit. footnote no. 2, at page 8.

⁶ Ex Article 116 EEC "From the end of the transitional period onwards; Member States shall, in respect of all matters of particular interest to the common market, proceed within the framework of international organisations of an economic character only by common action. To this end, the Commission shall submit to the Council, which shall act by a qualified majority, proposals concerning the scope and implementation of such common action. During the transitional period,

now repealed, and is currently complemented by Article 19(1) EU.⁷ As its provisions are currently drafted, Article 133 gives "an unusual amount of discretion"⁸ to the "Council, acting on a proposal from the Commission, and after consulting the European Parliament"⁹ as to the development and expansion of the Common Commercial Policy, to include "both the form and the content" of this policy.¹⁰ A further development of Article 133 was made in the proposed EU constitution, of which more in chapter 8.

On the topic of agriculture, the ECJ, in *Opinion 1/94*¹¹ found that given that the WTO Agreement on Agriculture's objective was to "establish, on a worldwide basis".... "a fair and market-oriented agricultural trading system" that the appropriate article in the EC treaty giving the Commission competence to conclude the WTO's Agreement on Agriculture was Article 113 EC, now renumbered Article 133 EC. This was despite the fact that compliance with the provisions of the Agreement on Agriculture necessitated internal regulation pursuant to Article 43 EC, now renumbered Article 37 EC.¹² The extent as to how far the pre-Amsterdam version of Article 133 EC extended was a major issue in *Opinion 1/94*, which was entitled *Re the Uruguay Round Treaty Texts*, and dealt with the competence of the EC, in its own right, to accede to the Uruguay Round agreements.

2.1 *Opinion 1/94*

It has been observed that the "creation of the WTO" has led to a development of the dynamic, and the "broadening and deepening of international

Member States shall consult each other for the purpose of concerting the action they take and adopting as far as possible a uniform attitude.

⁷ ex Article J.9 EU

⁸ Op. Cit. footnote no. 2, at page 6.

⁹ Article 133.5 EC.

¹⁰ Op. Cit. footnote no.2, at page 6.

¹¹ Op. cit. footnote no. 3, at paragraph VIII.

¹² At paragraph 29 of the report of the ECJ's Opinion.

trade and economic relations" requiring the EC to engage in "debates and initiatives which go far beyond traditional tariff negotiations".¹³ *Opinion 1/94*,¹⁴ together with *Opinion 2/94*¹⁵ which deals with the relationship between the EC and the Council of Europe in the area of Human Rights, have, with their exercise of "judicial restraint" in "working out the constitutional implications of submission to an external legal order", exhibited the use of subsidiarity as a guiding principle of the Court's interpretative power.¹⁶ EC competence was held, in *Opinion 1/94* not to extend to cover the totality of the GATS and TRIPs agreements, the ECJ thereby "not only recognizing the sensitivity of Member States in relation to the specific subject matter under discussion" but also "confirming the locus of the political power to alter Treaty obligations".¹⁷ This has resulted in the need for co-operation between the member states of the EC and the EC itself, both when negotiating and when implementing these mixed agreements.¹⁸ The impact of these two agreements in the area of agriculture will be examined in chapters 8 and 9.

The aforementioned doctrine of subsidiarity¹⁹ permeates EC law. Not only is it provided for by Article 5 EC, but is also addressed in protocol no. 7 of the Amsterdam Treaty.²⁰ The concept of subsidiary, with its "occupied field theory",²¹ whereby if the Community has legislated, "it acquires pre-emptive rights over the whole"²² of that field, has been juxtaposed by academics against a more limited pre-emption, whereby the Community only acquires "exclusive competence only in the specific area covered by the EC legislation", and not over the whole area of policy.²³

¹³ Op. cit. footnote no. 2, at page 6.

¹⁴ Op. cit. footnote no. 3, at para. 14.

¹⁵ *Opinion 2/94 (re ECHR)* [1996] ECR I-1759; [1996] 2 CMLR 265

¹⁶ Op. cit. footnote no. 2, at page 28.

¹⁷ Ibid. at page 13.

¹⁸ Ibid. at page 25 et seq.

¹⁹ referred to in chapter 1, and dealt with in more detail in chapter 6.

²⁰ Which came into force on the 1st of May 99.

²¹ Espoused by Toth A. "The Principle of Subsidiarity in the Maastricht Treaty" (1992) 29 CMLRev. 1079.

²² Burns, Tom: Subsidiarity: Principle and Practice, (1995) SLT 67, at page 69.

²³ Ibid. at page 69.

The issue of subsidiarity is relevant, and a "major aspect of Article 133 is the exclusivity of the powers it grants to the Community"²⁴ as it is the Council, after consulting with the European Parliament, which decides "when and whether to move external competence in the fields of services and intellectual property into exclusivity".²⁵ The ECJ in *Opinion I/94* referred to "the exclusive competence conferred on the community" pursuant to Article 133 EC, with regard to the CCP.²⁶ Despite the ECJ's finding in *Opinion I/94*²⁷ that only "in so far as rules have been established at (an) internal level does the external competence of the Community become exclusive", as pointed out by Marise Cremona "the Community's CCP powers have been held to be exclusive even where they have not (yet) been fully exercised, any Member State action in the meantime requiring specific authorization".²⁸ This situation is reflected in the WTO case of *European Communities - Customs Classification of Certain Computer Equipment*,²⁹ also known as the *LAN* case. In this case the United States "tried to bring a complaint against Ireland and the United Kingdom (while agreeing to bring a complaint against the EC as well)".³⁰ As can be seen above, the report, the conclusions and recommendations referred only to the EC. The case concerned the customs classifications utilised by the Irish and British authorities. The Appellate Body noted that the "EC constitutes a customs union and that the "export market" is the European Communities, not an individual Member State".³¹ This approach has been bolstered by the European Commission's view in the areas of shared competence, such as GATS and TRIPs, that "in the absence of any division of competences between the EU and its Member States, the EU bears international

²⁴ Op. cit. footnote no. 2, at page 21.

²⁵ Ibid. at page 21.

²⁶ Ibid. at page 21.

²⁷ Op. cit. footnote no. 3 at paragraph XIV.

²⁸ Op. cit. footnote no. 2, at page 23.

²⁹ *European Communities - Customs Classification of Certain Computer Equipment* Report of the Appellate Body of 5 June 1998 (AB -1998-2, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, p. 39).

³⁰ Rosas, Allan; Joinder of Parties and Third Party Intervention in WTO Dispute Settlement, Ch. 6 in Weiss, Friedl, (ed.) *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the practice of Other International Courts & Tribunals*, Cameron May, London, 2000, at page 81.

³¹ Ibid. at page 81.

responsibility for the fulfilment of the entire GATS and TRIPS agreements," and therefore should always be named as a defendant in a WTO case against an individual member state of the EC.³² This is also reflected in the internal case law of the EC, in the opinion of AG Tesauro in *Hermès*,³³ and appears now to be reflected in EC practice with regard to the WTO.³⁴ The actual impact of the WTO agreements on the internal legal structure of the EC will be examined in depth in chapter 6.

The role of the Council, after consulting with the European Parliament, in deciding how to develop external competences, may however be subject to further checks and balances, as evidenced in the *FAO fisheries agreement* case,³⁵ a non-WTO mixed agreement. The subject matter of this case was an arrangement between the EC and its member states, which was reached by way of agreement of the 19th December 1991 between the Council and Commission, "regarding preparation for FAO meetings, statements and voting". In this case the Commission brought an action against the Council, challenging the Council's decision, through COOPER, to permit member states of the EC a free vote on the FAO fisheries agreement. It was held by the ECJ at paragraph 50 of the judgment, that "by concluding that the draft Agreement concerned an issue whose thrust did not lie in an area within the exclusive competence of the Community and accordingly giving the Member States the right to vote for the adoption of that draft, the Council acted in breach of section 2.3 of the Arrangement which it was required to observe." It would appear therefore that the exclusive competence of the Council is subject to the provisions of the EC treaty, and the role of the European Commission as "guardian of the treaties".

The exact delimitation of the EC's Common Commercial Policy under Article 133 EC, post Amsterdam, pre-Nice, with the use of the "technique of

³² Ibid. at page 82.

³³ Case C-53/96 *Hermès International - FHT Marketing Choice BV*, [1998] ECR I-3603.

³⁴ Op. Cit. footnote no. 2, at page 24.

³⁵ Case C-25/94 *Commission of the European Communities v. Council of the European Union (FAO - Fishery agreement)* [1996] ECR I-1469.

delegation of the decision to a future Council of Ministers",³⁶ was in need of clarification. The same situation pertains with regard to the post-Nice situation. This arises from the drafting of the Article 133 EC provisions, and the possibility of their future extension with the article not "specifying on what basis that decision should be made, or indeed whether a newly extended commercial policy should possess all the characteristics (such as exclusivity) of the existing policy."³⁷ This continues to be the case post-Nice regarding intellectual property provisions, pursuant to Article 133.7 EC, and to the non-Article 133.6 GATS matters. In addition a horizontal agreement has yet to be agreed to deal with the areas of competence to be shared between the EC and its member states in the areas of services and intellectual property; however, in the interim it would appear that some version of the occupied field theory would apply.

3. Agricultural Aspects of the Common Commercial Policy

Long before the emergence of the World Trade Organisation the interaction of the internal commercial policy of the EC and the Common Agricultural Policy was examined in the *Ramel Cases* in 1977.³⁸ In that case it was held at paragraph 19 of the judgment that "the objectives of free movement and of the common agricultural policy should not be set one against the other nor in order of precedence but on the contrary combined and the principle of free movement should prevail save when the special requirements of the agricultural sector call for adaptations." This would reflect the provisions of the then Article 38(2) EC, now Article 32(2) EC, which provides that "save as otherwise provided in Articles 33 to 38, the rules laid down for the establishment of the common market" namely in this case Article 133 ex Article 113 EC, "shall apply to agricultural products".

³⁶ Op. cit. footnote no. 2, at page 33.

³⁷ Ibid. at page 32.

³⁸ Joined Cases 80 and 81/77, *Societe Les Commissionnaires Reunis SARL v Receveur des douanes SARL. Les fils de Henri Ramel v Receveur des douanes*. [1978] ECR 927.

The operation of the common organisation exceptions to the common commercial policy provisions was explained by the ECJ in *Ramel* on the basis that "many mechanisms of the organization of the market, such as price fixing and intervention systems, by organizing and regulating trade involve limitations on free movement and such limitations are not therefore of a temporary nature or justified by exceptional circumstances but are characteristic of the common agricultural policy".³⁹ Therefore the interference of the free movement provisions imposed by the Community in pursuance of a common organisation would be "acceptable" despite the fact that "they interfere with the free flow of goods between Member States and distort competition in the Common Market".⁴⁰ Therefore to the extent that the internal Common Agricultural Policy treaty provisions do not expressly require a distortion of the application of the Common Commercial Policy's application to trade within the EC in Agricultural goods, then trade in agricultural goods within the EC is to be determined by Article 133 ex Article 113 EC. Equally, under the doctrine of parallel powers, as developed earlier, and as dealt with in *Opinion I/94*, then the EC under Article 133 EC has exclusive competence to negotiate externally on international trade in agricultural goods. This issue was dealt with in paragraphs 29 to 33 of *Opinion I/94*, when the ECJ expressed the opinion that, despite the fact that the then Article 43, now Article 37, had been held in the case of *EC Commission v. EC Council*,⁴¹ as being the appropriate legal basis for not only "intra-community trade but also when they originate from non-member states",⁴² that the signing of the WTO Agreement on Agriculture fell into a different category. As the WTO document intended to "establish on a worldwide basis" a fair and marked-orientated agricultural trading

³⁹ At paragraph 18 of the judgment.

⁴⁰ McMahon, J.: *Law of the Common Agricultural Policy*, Pearson Education, 2000, at page 10.

⁴¹ Case 131/87, *E.C. Commission v. EC Council* [1989] 1 ECR 3764, [1991] 1 CMLR 780, para. 27.

⁴² Op. cit. footnote no.3, at paragraph 29 of the ECJ's Opinion.

system"" then the appropriate EC legal basis for signing the WTO Agreement on Agriculture was the then Article 113, now 133 EC.⁴³

The impact of this decision has already had a profound effect on the EC's Common Agricultural Policy, as has been seen in Chapter 2, and will continue to have a profound effect on the development of the CAP into the future. Of particular relevance to this chapter is the impact of the WTO agreement on the import levies which used to be imposed on agricultural goods being imported into the EC. These no longer exist. As was found by the ECJ in *Neumann v. Hauptzollamt Hof*,⁴⁴ import levies, despite their similarities to customs duties, had to be distinguished from them.⁴⁵ Import levies had been calculated, together with their related, but less utilised, export levies, ("imposed so as to prevent Community producers taking advantage of higher world prices"),⁴⁶ on the basis of, as in the case of cereals, the threshold price fixed for Rotterdam. This was pursuant to Article 10 of Council Regulation (EEC) No. 1766/92,⁴⁷ with special arrangements being made for malt under Article 11 of that regulation. The import levy was calculated on the basis of the "threshold price minus the c.i.f. price" at Rotterdam,⁴⁸ for all cereals. The threshold price was calculated, in the case of cereals, on the basis that the selling price for the imported product at Duisburg, on the Rhur, would be the same as the target price for that particular commodity set for that CAP accounting period.⁴⁹

⁴³ Ibid. at paragraph 29 of the ECJ's Opinion, quoting from the preamble to the WTO Agreement on Agriculture.

⁴⁴ Case 17/67, *Neumann v. Hauptzollamt Hof* [1967] ECR 441.

⁴⁵ Usher, John A.; *The Common Agricultural Policy and Commercial Policy*, in M. Maresceau (ed.) *the European Community's Commercial Policy after 1992: the Legal dimension*, Dordrecht; Boston: M.Nijhoff, 1993, at pages 135-156, at page 148.

⁴⁶ Ibid. at page 142.

⁴⁷ Council Regulation (EEC) No 1766/92 of 30 June 1992 on the common organization of the market in cereals, Official Journal L 181, 01/07/1992 p. 21.

⁴⁸ Op. cit. footnote no. 45, at page 141.

⁴⁹ Ibid. at page 140.

The above provisions were subsequently amended by Council Regulation (EC) No. 3290/94,⁵⁰ which was enacted to lay down the “transitional measures required in the agricultural sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations”.⁵¹ Part II of Annex I of this 1994 regulation provided that “the terms ‘levy’ and ‘levies’ shall be replaced by ‘duty’ and ‘duties’ respectively”. Against this backdrop, the newly substituted Article 10 provided that unless provided otherwise, then “the rates of duty in the Common Customs Tariff shall apply” to specified customs classifications of cereals, following the harmonised system of the World Customs Organisation, of which more later. The new Article 10 then went on to provide that an import duty could be applied, which should be “equal to the intervention price valid for such products on importation and increased by 55%, minus the c.i.f. import price applicable to the consignment in question.” However that import duty could “not exceed the rate of duty in the Common Customs Tariff”.

Under the recent mid-term review, Council Regulation (EC) No. 1784/2003,⁵² the aforementioned Council Regulation (EEC) No. 1766/92,⁵³ (together with its amendments) was repealed.⁵⁴ The pre-existing system of import and export licences continues,⁵⁵ with “rates of import duty in the Common Customs Tariff” to apply.⁵⁶ The regime in operation under Article 10 of Council Regulation (EC) No. 3290/94⁵⁷ is replicated in Article 10 of Council Regulation (EC) No. 1784/2003,⁵⁸ again for cereals covered by specific customs classification codes, with “representative c.i.f. import prices” to be “established

⁵⁰ Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations, Official Journal L 349, 31/12/1994 p. 105.

⁵¹ Article 1 of Council Regulation (EC) No. 3290/94.

⁵² Council Regulation (EC) No. 1784/2003 of 29 September 2003 on the common organisation of the market in cereals, OJ. L 270, 21/10/2003, p. 78.

⁵³ Op. cit. footnote no. 47.

⁵⁴ under Article 30 of Council Regulation (EC) No. 1784/2003.

⁵⁵ Article 9 of Council Regulation (EC) No. 1784/2003.

⁵⁶ Article 10.1 of Council Regulation (EC) No. 1784/2003.

⁵⁷ Op. cit. footnote no. 50.

⁵⁸ Op. cit. footnote no. 52.

on a regular basis” for those cereals. Additional import duties may also be payable under Article 11 of Council Regulation (EC) No. 1784/2003⁵⁹ should there be a need to “prevent or counteract adverse effects” within the Community, however these can only be for “imports made at a price below the level notified by the Community to the World Trade Organisation (“the trigger price”) may be subject to an additional import duty”.⁶⁰

Two further agriculturally relevant WTO agreements were also addressed by *Opinion 1/94*, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), and the Agreement on the Technical Barriers to Trade (TBT). The ECJ held that the SPS agreement could be concluded "on the basis of Article 133 alone", ⁶¹ and that the TBT agreement also fell "within the ambit of the Common Commercial Policy".⁶² An analysis of the operation of the SPS agreement will be made in chapter 4, with both the SPS and TBT agreement being discussed further in chapter 8.

4. Common Customs Code

The EC, in its Common Customs Tariff now "follows closely the structure of the Harmonised System",⁶³ of the World Customs Organisation, (WCO),⁶⁴ as do many other countries around the world. The WCO comprises 166 members and is based in Brussels. The WCO, known before 1994 as the Customs Co-operation Council,⁶⁵ operated the Common Customs Code (CCC). The CCC was set up under the International Convention on the Simplification and Harmonisation of Customs Procedures was first signed in Kyoto on the 18th May

⁵⁹ Ibid.

⁶⁰ Article 11.2 of Council Regulation (EC) No. 1784/2003.

⁶¹ Op. cit. footnote no. 3. at paragraph 31.

⁶² Ibid. at paragraph 33.

⁶³ Snyder, Francis: *Governing Economic Globalisation: Global Legal Pluralism and EU law*, Ch. 1 in Snyder, Francis (ed.); *Regional and global Regulation of International Trade* Hart Publishing, Oxford - Portland Oregon 2002-11-27, at page 24 at footnote no. 129.

⁶⁴ <http://www.wcoomd.org>

⁶⁵ Founded in 1952.

1973, and entered into force on the 25th September 1974. It has recently been updated pursuant to the 1999 revised Convention. While only countries can become members of the International Convention on the Simplification and Harmonisation of Customs Procedures 1973, as all the member states of the EC have signed this convention, the ECJ took the view in the case of *Nederlandse Spoorwegen v. Inspecteur der Invoerrechten en Accijnze*⁶⁶ that "the Community has replaced the Member States in commitments arising from the Convention",⁶⁷ with either the member state holding the Presidency of the EC, or the Commission representing the EC at WCO meetings. The WCO operates within four objectives: the drafting and promotion of new agreements on customs and customs co-operation; ensuring, as best as possible, outside a rigid legal framework, uniform interpretation of WCO documentation, namely the Convention establishing a Customs Co-operation Council,⁶⁸ the International Convention on the Harmonized Commodity Description and Coding System,⁶⁹ and the Valuation Convention;⁷⁰ the provision of a conciliation system for disputing parties; all complemented by the provision of "information and advice to governments in this field of activity".⁷¹

The Harmonised Commodity Description and Coding System (HS)⁷² operated by the WCO, entered into force, within the EC, pursuant to Council Decision 87/369/EEC⁷³ on the 1st January 1988, and is used by its member states, the EC and the WTO for the classification of commodities. Amendments to the

⁶⁶ Case 38/75 *Nederlandse Spoorwegen v. Inspecteur der Invoerrechten en Accijnzen* [1975] ECR 1439.

⁶⁷ Op. cit. footnote no. 63, at page 24.

⁶⁸ Convention establishing a Customs Co-operation Council Cmd 9232 (15 December 1950), in force 4 November 1952, 157 UNTS 129; TIAS 7063).

⁶⁹ International Convention on the Harmonized Commodity Description and coding System, done at Brussels on 14 June 1983, and the Protocol thereto, done at Brussels on 24 June 1986 (OJ 1987 L198 L198/3), 1035 UNTS 3, KAV 2260.

⁷⁰ Convention on the Valuation of Goods for Customs Purposes, Cnd 9233 (15 December 1950), in force 28 July 1953, 171 UNTS 305.

⁷¹ Op. cit. footnote no. 63, at page 25.

⁷² International Convention on the Harmonized Commodity Description and Coding System, Official Journal L 198, 20/07/1987 p. 3.

⁷³ Council Decision 87/369/EEC concerning the conclusion of the International Convention on the Harmonized Commodity Description and Coding System and of the Protocol of Amendment thereto, Official Journal L 198, 20/07/1987 p. 1.

Harmonised System Nomenclature should be effective from 1st January 2007.⁷⁴

As stated at the beginning of chapter 1, the subject matter of this thesis is "processed and semi-processed agricultural and primary products in Chapters 1-24 of the Brussels Tariff Nomenclature⁷⁵ (BTN)",⁷⁶ being the products referred to in Annex 1 of the WTO Agreement on Agriculture as HS Chapters 1-24 less fish and fish products, (plus specific named commodities).

5. Valuations for customs purposes

Customs duties can be either calculated and imposed on specific items, or they, more normally, are calculated on an *ad valorem* basis. As it is the responsibility of the customs authorities of the various Member States to value goods for customs purposes,⁷⁷ with the creation of the Common Customs Code it was necessary to develop a unified system for the calculation of the valuation of goods for customs purposes. International legal provisions have, from the outset of the Common Customs Code, had a great impact on the EC's policy on valuation for customs purposes.⁷⁸ Article VII of GATT 1947, now part of GATT 1994 provided global rules for the valuation of goods, which provides that valuation is to be based on the "actual value"⁷⁹ of the goods. The provisions of GATT 1947, together with the attached interpretative notes, were incorporated into the law of the Member States of the EC by way of the Brussels Convention on the Valuation of Goods for Customs Purposes.⁸⁰ There remained, however, a problem with the definition of valuation for customs purposes within the customs union, with a "Community statement of the principles of valuation" still being

⁷⁴ World Customs Organisation website <http://www.wcoomd.org>.

⁷⁵ The BTN was set out in the Nomenclature Convention of Brussels of the 15 December 1950, adopted into EC law by way of Council Regulation 950/68 of 28 June 1968 [1968] OJ Spec Ed (I) 275, together with the Annex attached thereto.

⁷⁶ McMahon, Joseph M.; "Agricultural Trade, Protectionism and the Problems of Development" Leicester University Press, 1992, at page 159.

⁷⁷ Lyons: EC Customs Law, Oxford University Press 2001, ISBN 0-19-876492-8, at page 243.

⁷⁸ Ibid. at page 243 et seq.

⁷⁹ Article VII.2(b) GATT 1947 and 1994.

⁸⁰ Signed on the 15 December 1950 and in force on 25 July 1953.

required.⁸¹ Regulation (EEC) No. 803/1968⁸² addressed this issue, by providing a definition for "normal price" of goods.⁸³

The concept of "normal price" was replaced by the concept of "transaction value" after the Tokyo round of GATT negotiations.⁸⁴ The transaction cost is the "price actually paid or payable for the goods" on the assumption that the price is deemed to have "been agreed between and independent seller and buyer".⁸⁵ The effect of this change is to shift the burden of proof from the importer to customs and excise, should they wish to challenge the price declared as having been paid. Following the case of *Malt GmbH v. Hauptzollamt Dusseldorf*⁸⁶ the cost of acquisition of certificates of authenticity, where applicable, is to "be regarded as an integral part of the price paid or payable for the goods", and is to be included in the calculation of the customs value of the goods in question.⁸⁷ Other ancillary costs which are to be added to the transaction value of goods for the purpose of calculating the customs value of goods, are set out in Article 32 of the Common Customs Code⁸⁸ of the World Customs Organisation, as discussed earlier in this chapter. The Common Customs Code also sets down "a list of successive rules" for secondary valuations methods to be used "where the transaction value between the exporter and the importer cannot be established" or be accepted by the Customs officials.⁸⁹ The issue of currency fluctuations is addressed by way of Council Regulation 2913/92,⁹⁰ which provides that the rate of exchange is to be

⁸¹ Op. cit. footnote no. 77, at page 244.

⁸² Regulation (EEC) No. 803/1968, of 27 June 1968 [1968] OJ L 148/6.

⁸³ Op. cit. footnote no. 77, at page 244.

⁸⁴ Regulation (EEC) 803/68 was repealed, with "transaction value" being introduced into Community law by Council Regulation (EEC) 1224/80, 28 May 1980 [1980] OJ L 134/1. This was subsequently amended by the introduction of the Community Customs Code. See further Lyons: EC Customs Law, Oxford University Press 2001, at page 245.

⁸⁵ Case C-422/00 *Capespan International plc v Commissioners of Customs & Excise*, [2003] ECR I-597, at paragraph 9 of the judgment.

⁸⁶ Case C-219/88 *Malt GmbH v. Hauptzollamt Dusseldorf* [1990] ECR I-1481, at paragraph 13 of the judgment.

⁸⁷ Snyder, Francis; *International trade and Customs Law of the European Union*, Butterworths, 1998, at page 55.

⁸⁸ Ibid. at page 56, footnote no. 18.

⁸⁹ Ibid. at page 63.

⁹⁰ Council Regulation 2913/92 establishing the Community Customs Code, OJ L 302, 19/10/1992 p. 1, at Art 35.

that published by the competent authorities of the country “other than that of the Member State where the valuation is made”, which in principle will be the “rate recorded on the second-last Wednesday of a month and published on that or the following day”,⁹¹ with exceptions being provided for exchange rate fluctuations in excess of 5% in any particular week.⁹²

Under the pre Tokyo round procedure in the area of agricultural commodities, the “normal price” was calculated, by way of a reference price, for example, in the case of fruit and vegetables, pursuant to Commission Regulation (EEC) No. 2118/74.⁹³ The actual reference price was reset for each agricultural marketing year, and had, as one of its objectives, the protection of commodities covered by EC common market organisations, ensuring that duty would be levied on “products of a certain origin where the average price of all imports of that product was lower than a specific reference price”.⁹⁴ As stated in the *Capespan* case,⁹⁵ the reference price system “was called into question by the signature” of the Final Act of the Uruguay Round, and the coming into being of the WTO. Following the adoption of the Common Customs Code a separate procedure for perishable goods⁹⁶ can be requested by the declarant under Article 36(2) of Council Regulation 2913/92.⁹⁷ This procedure, pursuant to Commission Regulation 2545/93,⁹⁸ requires a unit value per each 100 kg net, “to be expressed in the currencies of the Member States”,⁹⁹ with “the unit values .. established by the Commission on alternate Tuesdays on the basis of the weighed average of the average free at-frontier unit price, not cleared through customs”.¹⁰⁰

⁹¹ As per Commission Regulation 2454/93 Art 169(1), OJ 11.10.93 L253/1.

⁹² Op. cit. footnote no. 87, at page 67.

⁹³ Regulation (EEC) No. 2118/74 of the Commission of 9th August 1974 laying down detailed rules for the application of the system of reference prices for fruit and vegetables, OJ L 20, 10/08/1974, p. 20.

⁹⁴ Op. cit. footnote no. 85, at paragraph 12 of the judgment.

⁹⁵ Ibid. at paragraph 14.

⁹⁶ Classified under Annex 26 to Commission Regulation 2454/93, OJ 11.10.93, L 253/1.

⁹⁷ Op. cit. footnote no. 90.

⁹⁸ Commission Regulation 2545/93 Art 173 (1), OJ 11.10.93 L253/1. See also Commission Regulation 919/98 OJ 30.4. 98 L 128/51.

⁹⁹ Op. cit. footnote no. 87, at page 68.

¹⁰⁰ Ibid. at page 68.

A separate system operates for perishable fruit and vegetables, (given that any dispute as to valuation might extend beyond their short shelf life). A new entry price mechanism for fruit and vegetables is now set out in Article 5(1) of Regulation No. 3223/94,¹⁰¹ with the new regulations dealing with the post-Uruguay Round CAP agricultural provisions being provided for in Council Regulation (EC) No. 3290/94.¹⁰² Under Commission Regulation (EC) No 3223/94¹⁰³ member states are required to report back to the European Commission the "average representative prices of the products imported from third countries" on a particular day, on a particular market,¹⁰⁴ or in the alternative, "where no prices for the representative markets are available, significant prices for imported products recorded on other markets" together with "the total quantities relating to" said prices. These prices are to be calculated with the costs of freight and insurance deducted, (Article 2.2) and reductions of 9% being made "to take account of the "wholesaler's trade margin" together with a reduction of an "amount equal to ECU 0,6 per 100 kilograms" to cover handling and market taxes and charges."¹⁰⁵ On the basis of these figures returned by member states to the Commission, the Commission, pursuant to Article 4 of the regulation is to fix for "each working day and for each origin, a standard import value equal to the weighted average of the representative prices" returned by the member states, "less a standard amount of ECU 5/100 kg and the ad valorem customs duties". It is these figures which will be used to determine the valuation for customs purposes of perishable products being imported into the EC from third countries.

¹⁰¹ Commission Regulation (EC) No 3223/94 of 21 December 1994 on detailed rules for the application of the import arrangements for fruit and vegetables, Official Journal L 337, 24/12/1994 p. 66, "as amended by Annex XIII of Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay round of multilateral trade negotiations (OJ 1994 L 349, p. 105, hereinafter "the amended basic regulation")." Case C-422/00. *Capespan International plc v Commissioners of Customs & Excise* [2003] ECR I-159.

¹⁰² Op. cit. footnote no. 50.

¹⁰³ Commission Regulation (EC) No 3223/94 of 21 December 1994 on detailed rules for the application of the import arrangements for fruit and vegetables, Official Journal L 337, 24/12/1994 p. 66.

¹⁰⁴ Article 2 Commission Regulation (EC) No 3223/94.

¹⁰⁵ Article 2.3 Commission Regulation (EC) No 3223/94.

In the absence of a standard import value, then the "average of standard import values in force for that product" will be applied.¹⁰⁶

6. Rules of Origin

The issue of rules of origin remained the main unharmonised provision after the coming into force of the Tokyo Round's Customs Valuation Code in 1979 and the International Convention on the Harmonized Commodity Description and Coding System of the then named customs Co-operation Council (now known as the World Customs Organisation) in 1988,¹⁰⁷ referred to above. This has resulted in rules of origin being the only part of the current customs legislation originally drafted by the EC, and not influenced by outside bodies or organisations. Guidelines were provided in the CCC convention dealing with Rules of Origin, however it did not regulate this particular matter. This lack of a standard "rule of origin" system is of particular relevance to the EC, which "is one of the most enthusiastic users of Free-trade areas and customs unions",¹⁰⁸ with the EC operating different systems in its variety of agreements, ranging from its Lomé/Cotonou relations to its GSP and Euro-Med relations.¹⁰⁹ Rules of Origin break up into distinct groups, preferential and non-preferential rules of origin. The non-preferential rules of origin "are commonly understood to apply to most favoured nation (MFN) trade"¹¹⁰ and are now regulated by the Uruguay Round Agreement on Rules of Origin, to which is annexed,¹¹¹ a Common Declaration with Regard to Preferential Rules of Origin. The legal status of this declaration,

¹⁰⁶ Article 4.3 Commission Regulation (EC) No 3223/94.

¹⁰⁷ Inama, Stefano; *A Comparative Analysis of the Generalized System of Preferences and Non-Preferential Rules of Origin in the Light of the Uruguay Round Agreement; Is it a Possible Avenue for Harmonization or Further Differentiation?* J.W.T. 1995, 29(1), 77-111, at page 77.

¹⁰⁸ Driessen, Bart and Graafsma, Folkert; *"The EC's Wonderland; an Overview of the Pan-European Harmonised Origin Protocols*, J.W.T. 1999, 33(4), 19-45, at page 19.

¹⁰⁹ *Ibid.* at page 19.

¹¹⁰ *Op. cit.* footnote no. 107, at page 177 et seq.

¹¹¹ Annex II to the Uruguay Round Agreement on Rules of Origin.

which deals with rules of origin in the case of the GSP scheme, or in free trade agreements, is not clear.¹¹²

The Uruguay Round Agreement on Rules of Origin for non-preferential trade reads as a document reflecting work in progress. It provides clarity as to when non-preferential rules of origin are to be applied,¹¹³ and provisions for their application during a transition period during which clearer rules on "rules of origin" are to be determined. A Committee on Rules of Origin is set up within the WTO structure, under Article 4.1 of the Agreement, which, assisted by a WTO Technical Committee on Rules of Origin, (Article 4.2) working with the then Customs Co-operation Council, (now known as the World Customs Organisation), is to draft new WTO regulations for non-preferential "Rules of Origin". This is an "ambitious agenda" for the World Customs Organisation, "to elaborate a harmonized set of non-preferential rules of origin based on the process criterion" set against years of varied practice throughout the world.¹¹⁴ The UNCTAD, for its part, has, with few results, through its Special Committee on Preferences, "been discussing possible harmonisation of GSP rules of origin for almost twenty years".¹¹⁵ Agreement on non-preferential rules of origin could lead to further developments in the preferential rules of origin debate. For its part the EC has legislated for non-preferential rules of origin in Regulation 2913/92,¹¹⁶ (very much replicating its 1968 provisions)¹¹⁷ which deals with the EC's Common Customs Code. This code "defines the non-preferential origin of goods for the

¹¹² Op. cit. footnote no. 107, at page 78.

¹¹³ Article 1.2, when read in conjunction with Article 1.1 of the Agreement on Rules of Origin provides that "Rules of origin (covered by this agreement)... shall include all rules of origin used in non-preferential commercial policy instruments, such as in the application of: most-favoured-nation treatment under Articles I, II, III, XI of GATT 1994; anti-dumping and countervailing duties under Article VI of GATT 1994; safeguard measures under Article XIX of GATT 1994; origin marking requirements under Article IX of GATT 1994; and any discriminatory quantitative restrictions or tariff quotas. They shall also include rules of origin used for government procurement and trade statistics."

¹¹⁴ Op. cit. footnote no. 107, at page 81.

¹¹⁵ Ibid. at page 80.

¹¹⁶ Op. cit. footnote no. 90.

¹¹⁷ Regulation (EEC) No 802/68 of the Council of 27 June 1968 on the common definition of the concept of the origin of goods, Official Journal L 148, 28/06/1968 p. 1, with Articles 23 and 24 of the 1992 legislating almost replicating the provisions of Articles 4 and 5 of the 1968 legislation.

purposes of " the application of the EC's customs tariff,¹¹⁸ with "the Community's rules on non-preferential origin" following closely those set out in the WTO Agreement on the Rules of Origin.¹¹⁹ While preferential rules of origin differ from scheme to scheme,¹²⁰ the concept of preferential measures is set out in Article 20(3)(d) and (e)¹²¹ of Council Regulation 2913/92.¹²² A distinction is also made between "goods wholly obtained in one country" and goods whose origin "involved more than one country".¹²³

Within the EC the issue of multi-origin goods (known as "goods whose production involved more than one country"¹²⁴), allied with the issue of regional cumulation for Rules of Origin, differs considerably between the non-preferential rules of origin, and, for example, the EC's regulation of its Generalised System of Preferences, with the system operating for the GSP being stricter than that being applied for MFN states. Both schemes are provided for in Commission Regulation 2454/93,¹²⁵ which was adopted in order to implement the Community Customs Code,¹²⁶ which is contained in Regulation 2913/92.¹²⁷ The EC, following international guidance, deems goods, under the non-preferential rules, to originate from the country where they underwent their last substantial working or processing.¹²⁸ For goods under the preferential rules of origin, as in the GSP scheme, the EC requires goods to change their tariff heading classification in their

¹¹⁸ Op. cit. footnote no. 87, at page 22.

¹¹⁹ Ibid. at page 22, footnote no. 3.

¹²⁰ GSP, Cotonou., EFTA, etc. of which more later in this chapter.

¹²¹ Article 20.3. Council Regulation 2913/92; "The Customs Tariff of the European Communities shall comprise:

(d) the preferential tariff measures contained in agreements which the Community has concluded with certain countries or groups of countries and which provide for the granting of preferential tariff treatment

(e) preferential tariff measures adopted unilaterally by the Community in respect of certain countries, groups of countries or territories".

¹²² Op. cit. footnote no. 87, at page 22, footnote no. 3.

¹²³ Ibid. at page 22.

¹²⁴ Op. cit footnote no. 90 at Article 24.

¹²⁵ Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, Official Journal L 253, 11/10/1993 p. 1.

¹²⁶ Op. cit. footnote no. 107, at page 82.

¹²⁷ Op. cit. footnote no. 90.

¹²⁸ Op. cit. footnote no. 107, at page 83.

country of last processing, in order to be deemed to have come from that country.¹²⁹ While the preferential text is technical and explicit, in adopting the process criterion, the non-preferential test is generally considered to permit "a certain degree of discretion in the hands of" the EC institution which is interpreting this provision.¹³⁰ This discretion was challenged in the case of *Directeur des Douanes et des Droits Indirects v. Cousin and Others*,¹³¹ which was litigated pursuant to Commission Regulations 802/68 and 749/78. Here Egyptian yarn was being imported into Germany, and was being subjected to dyeing, gassing and mercerising before being further exported to other EC Member States. The Commission had provided that such processing was not sufficient to confer a new origin on the goods by way of Commission Regulation 749/78, despite the fact that cloth subjected to similar processing, under different regulations, did obtain a new origin. The ECJ held, at paragraph 21 of its judgment that it appeared "contradictory and discriminatory" to "provide substantially more severe criteria for the determination of the origin of cotton yarn" than for the determination of origin of cloths and fabrics, and as a consequence, that the classification of processing of cotton yarn by way of "dyeing, gassing and mercerising" as not granting a new origin, was invalid.¹³²

Regional cumulation provisions for preferential rules also distinguish preferential and non-preferential rules of origin, as there is no provision for regional cumulation in the non-preferential rules of origin, and goods must originate "within a single country".¹³³ In the preferential schemes, the EC has established "special rules on regional cumulation for specific regional groupings",¹³⁴ such as ASEAN¹³⁵ or CACM.¹³⁶ In these cases, "products

¹²⁹ Ibid. at page 83.

¹³⁰ Ibid. at page 84.

¹³¹ Case 162/82 *Directeur des Douanes et des Droits Indirects v. Cousin and Others*, [1983] ECR 1101.

¹³² At paragraph 22 of the Judgment.

¹³³ Op. cit. footnote no. 107, at page 97.

¹³⁴ Op. cit. footnote no. 87, at page 35.

¹³⁵ Association of South - East Asian Nations.

¹³⁶ Central American Common Market.

originating" from one country in a regional group "and used in further manufacture in another country of the group must be treated as if they originated in the country of further manufacture".¹³⁷ This will happen only if certain conditions are met.¹³⁸ Some preferential schemes are offered full regional cumulation, others, such as the EC's GSP are only offered "partial" regional cumulation. Full regional cumulation is granted to the ACP countries under the Lomé / Cotonou agreements.¹³⁹ The variety of practices existing in the area of "rules of origin" as a whole is such that, as Inama has stated "the "neutral" concept of origin is long gone: today's rules of origin are used as, or simply are, instruments of commercial policy".¹⁴⁰ The role of the WTO's Committee on the Rules of Origin, operating, through the WTO's Technical Committee on Rules of Origin, with the World Customs Organisation, will have to resolve the many complexities of regulation in this area, initially, as set out in the WTO Agreement on Rules of Origin, for non-preferential rules of origin, but also, in the absence of some developments at UNCTAD on GSP rules of origin, some way down the line, also on preferential rules of origin. Of some consolation to the readers of this thesis is the fact that agricultural products are normally raw materials, or materials at the first state of processing, which for practical purposes, do not normally give rise to complex questions as to origin. Any agricultural product which has undergone substantial processing has normally ceased to be an agricultural product, and has changed its HS classification.

7. Tariff and non-tariff barriers

Reflecting the development of the Common Agricultural Policy generally through its various reforms,¹⁴¹ with the move from levies to duties to the common

¹³⁷ Op. cit. footnote no. 87, at page 35 et seq.

¹³⁸ As set out in Article 72a(2) of Commission Regulation 2454/93, as amended.

¹³⁹ Op. cit. footnote no. 107, at page 98, footnote no. 39.

¹⁴⁰ Ibid. at page 109.

¹⁴¹ As discussed in chapter 2, and under the heading of "Agricultural Aspects of the Common Commercial Policy" in this chapter.

customs tariff, so too has the position of tariffs and non-tariff barriers been altering over this time period. The developing position of tariffs and non-tariff barriers has reflected the developments from the internal price structure in the common market for cereals in 1975,¹⁴² with its elaborate price structure based on target prices, fixed for Duisberg in the Rhür, the uniform intervention price, and their accompanying threshold price, which continued to operate in the post 1992 reforms, pursuant to Council Regulation 1766/92,¹⁴³ to the post-mid-term review situation pursuant to Council Regulation (EC) No. 1782/2003.¹⁴⁴ The threshold price, which operated as a non-tariff barrier, was also fixed “for the port of Rotterdam” and operated as the “minimum price at which the relevant goods” could enter the Community.¹⁴⁵ The threshold price was calculated “not from the intervention price but from the higher target price” thereby disadvantaging third country importers even further within the EC market,¹⁴⁶ with a difference between these two prices, the target price and the intervention price, including “an element to allow for the cost of transport between Rotterdam and Duisburg”.¹⁴⁷ Pursuant to the 1992 regulation¹⁴⁸ the threshold price was no longer linked to a geographical locus, but was “fixed by Council Regulation 1766/92 so as to be reduced by fixed amounts over a three year period”.¹⁴⁹ Subsequent to the recent mid-term review restructuring of the CAP, pursuant to Council Regulation (EC) No. 1782/2003,¹⁵⁰ the new cereals common organisation provisions, as set out in

¹⁴² Pre Mac Sharry reforms Regulation No. 2727/75, [1975] OJ L No.281/1, which consolidated and updated the previous regulations, but which was repealed and replaced by Council Regulation (EEC) No. 1766/92 of 30 June 1992 on the common organisation of the market in cereals, OJ L. 181, 1.7.92, page 21. The exact products covered by this regulation are set out in Article 1 of both regulations. The 1992 regulation operates in conjunction with Regulation (EEC) No. 1765/92 on assistance for arable farmers, Article 1.2 of Council Regulation (EEC) No. 1766/92.

¹⁴³ *Op. cit.* footnote no. 47.

¹⁴⁴ Council Regulation (EC) No 1782/2003 of 29th September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No. 2019/93, (EC) No. 1452/2001, (EC) No. 1453/2001, (EC) No. 1454/2001, (EC) 1868/94, (EC) No 1251/1999, (EC) No. 1254/1999, (EC) No. 1673/2000, (EEC) No. 2358/71 and (EC) No. 2529/2001, OJ L 270/1.

¹⁴⁵ Usher, John; *EC Agricultural Law*, 2nd edition, Oxford University Press, 2001, at page 81.

¹⁴⁶ *Ibid.* at page 81.

¹⁴⁷ *Ibid.* at page 81.

¹⁴⁸ *Op. cit.* footnote no. 47.

¹⁴⁹ *Op. cit.* footnote no. 145, at page 81.

¹⁵⁰ *Op. cit.* footnote no. 144.

Council Regulation (EC) No. 1784/2003,¹⁵¹ still makes use of tariff quotas,¹⁵² with supporting legislative provisions providing further details of how the tariff quotas are to operate.¹⁵³

Non-tariff measures restricting market access have however ceased to be important for the protection of the CAP from external effects, with the WTO Agreement on Agriculture's requirement for the tariffication of non-tariff barriers under the agreement's market access commitments.¹⁵⁴ This reflects the fact that "the fundamental aim of the Agreement on Agriculture" is to require the conversion by WTO member states of "permitted restrictions into customs duties" with a view to achieving greater compatibility and transparency between WTO member states, and then to subject those, now much more quantifiable customs duties, to reductions.¹⁵⁵ This development is reflected in a change in focus from import levies, to duties, to the common customs tariff, through the evolving legislative framework for cereals.¹⁵⁶ Tariffs, in the guise of import duties still

¹⁵¹ Op. cit. footnote no. 52, and supplemented by Commission Regulation (EC) No 2237/2003 of 23 December 2003 laying down detailed rules for the application of certain support schemes provided for in Title IV of Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, OJ L 339 of 24.12.2003.

¹⁵² At Article 12 of Council Regulation (EC) No. 1784/2003, replacing Article 12 of Council Regulation (EC) No. 3290/94.

¹⁵³ Commission Regulation (EC) No 2305/2003 of 29 December 2003 opening and providing for the administration of a Community tariff quota for imports of barley from third countries, OJ L 342 of 30.12.2003, Commission Regulation (EC) No 2377/2002 of 27 December 2002 opening and providing for the administration of a Community tariff quota for malting barley from third countries and derogating from Council Regulation (EC) No 1766/92 OJ L 358 of 31.12.2002. Last amended by Regulation (EC) No 626/2003, OJ L 90 of 8.4.2003. Extended by Regulation (EC) No 1112/2003, OJ L 158 of 27.6.2003, Commission Regulation (EC) No 2375/2002 of 27 December 2002 opening and providing for the administration of Community tariff quotas for common wheat of a quality other than high quality from third countries and derogating from Council Regulation (EEC) No 1766/92, OJ L 358 of 31.12.2002. Last amended by Regulation (EC) No 532/2003, OJ 26.3.2003. Extended by Regulation (EC) No 1111/2003, OJ L 158 of 27.6.2003. Commission Regulation (EC) No 2133/2001 of 30 October 2001 opening and providing for the administration of certain Community tariff quotas and tariff ceilings in the cereals sector and repealing Regulations (EC) No 1897/94, (EC) No 306/96, (EC) No 1827/96, (EC) No 1970/96, (EC) No 1405/97, (EC) No 1406/97, (EC) No 2492/98, (EC) No 2809/98 and (EC) No 778/1999, OJ L 287 of 31.10.2001.

¹⁵⁴ This will be discussed further in chapter 4.

¹⁵⁵ Op. cit. footnote no. 145, at page 71.

¹⁵⁶ From Council Regulation (EEC) No 1766/92 of 30 June 1992 on the common organisation of the market in cereals, Official Journal L 181, 01/07/1992 p. 21, through Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in

operate in the post mid-term review era, but import duties have been relegated to a safeguard measure, and one which must be operated and maintained in a WTO Agreement on Agriculture compliant fashion.

8. Import Protection post Uruguay

Given that for goods generally, under the Uruguay Round treaty texts, there is an Agreement on Safeguards, it is no surprise that the WTO Agreement on Agriculture also contains special safeguard provisions in Article 5.¹⁵⁷ Import protection provisions therefore continue in existence in the post Uruguay agricultural provisions, and for cereals, these provisions are written into Articles 11 of both Council Regulation (EC) No. 3290/94¹⁵⁸ and Council Regulation (EC) No. 1784/2003.¹⁵⁹ Article 11 of the 1994 regulation makes more specific reference to Article 5 of the Agreement on Agriculture, than does Article 11 of the 2003 regulation. This might be accounted for as a successor to the Uruguay Round Agreement on Agriculture was, in 2003, then under discussion since 2000, pursuant to Article 20 of the Uruguay Round Agreement on Agriculture. Given this distinction in drafting, many of the provisions of the two Articles 11 are the same, and at times identical. The additional import duty, referred to under the “Agricultural Aspects of the Common Agricultural Policy” heading in this chapter, being calculated on the basis of “representative c.i.f. import prices”,¹⁶⁰ can be imposed “in order to prevent or counteract adverse effects on the market of the Community” if “conditions to be determined by the Commission” are fulfilled.¹⁶¹ This “additional import duty” would be in addition to the import duty

the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations, Official Journal L 349, 31/12/1994 p. 105, to the current Council Regulation (EC) No. 1784/2003 of 29 September 2003 on the common organisation of the market in cereals, OJ. L 270, 21/10/2003, p. 78.

¹⁵⁷ Of which more in chapter 4.

¹⁵⁸ Op. cit. footnote no. 50.

¹⁵⁹ Op. cit. footnote no. 52.

¹⁶⁰ Article 10.3 of Council Regulation (EC) No. 1784/2003.

¹⁶¹ Article 11 of Council Regulation (EC) No. 1784/2003.

imposed on the goods in accordance with the Common Customs Tariff, calculated in accordance with Article 10 of Council Regulation (EC) No. 1784/2003. These additional payments will become payable if imports of the particular cereal at below a trigger price, which is “the level notified by the Community to the World Trade Organisation”, or if the volume of the cereals imported exceeds a “trigger volume”.¹⁶²

9. Anti-dumping and Export Subsidies

Annexed to the Uruguay Round Final Act, in Annex 1, are two agreements, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, dealing with antidumping provisions, and the Agreement on Subsidies and Countervailing Measures. While these provisions might initially appear to have a limited effect on agricultural trade by virtue of the provisions of Article 21 of the WTO Agreement on Agriculture, which provides that “the provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement”,¹⁶³ some discussion is however merited. In addition the Agreement on Subsidies and Countervailing Measures, Article 3.1, interacts with the Agreement on Agriculture, Article 8,¹⁶⁴ as discussed under the following heading in this chapter, “Export Subsidies”. Despite the fact that the Agreement on Agriculture contains its own provisions which affect the impact of the general provisions on anti-dumping, countervailing measures, and export subsidies on global agricultural trade, under its market access and its own special safeguard

¹⁶² Article 11.2 of Council Regulation (EC) No. 1784/2003.

¹⁶³ Article 21 Agreement on Agriculture: “1. The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement. 2. The Annexes to this Agreement are hereby made an integral part of this Agreement.”

¹⁶⁴ Article 8 of the Agreement on Agriculture, which provides “Each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member’s Schedule”.

provisions,¹⁶⁵ the issue of the impact of the expiration of the peace clause, contained in Article 13 of the Agreement on Agriculture,¹⁶⁶ might well bring the antidumping provisions, and the Agreement on Subsidies and Countervailing Measures, along with the balance of the Annex IA Uruguay round agreements, into play for agricultural trade.

The EC's commitments under the WTO anti-dumping agreement and the subsidies and countervailing measures provisions were implemented into EC law by Council Regulation 384/96 as amended,¹⁶⁷ and Council Regulation 2026/97,¹⁶⁸ as amended, respectively. Prior to the Uruguay Round texts the EC had maintained one scheme for both anti-dumping and countervailing duties. While anti-dumping measures are intended to address the issue of "distortive effects which dumping practices by firms established in third countries in the community market", and countervailing measures are intended to address the issue of the distortive effects within the Community market of "unfair foreign government subsidisation",¹⁶⁹ the two new schemes do however overlap at times, with the main differences between the two being "respective rules on the calculation of the dumping margin and the countervailable subsidy margin".¹⁷⁰

Currently operating for non-agricultural commodities, under the anti-dumping provisions of Council Regulation 384/96, the export price is to be the "price actually paid or payable for the product when sold for export" on leaving the exporting country.¹⁷¹ This Regulation provides that in the event that there is

¹⁶⁵ As discussed in chapter 4.

¹⁶⁶ Discussed later in this part, and referred to further in chapter 4, and analysed in depth, in the context of the synergy of EC and WTO provisions in the area of agriculture, in chapter 7.

¹⁶⁷ Council Regulation 384/96, OJ 6.3.96 L56/1, as amended, by Council Regulation 2331/96, OJ 6.12.96 L317/1, and Council regulation 905/98, OH 30.4.98, OJ 30.4.98, L128/18, replacing Council Regulation 3283/94 L349/1, 31.12.94 L349/1, as amended by Council Regulation 1251/95, OJ 2.6.95 L122/1, Snyder, Francis; International Trade Law and Customs Law of the European Union, Butterworths, 1998, at page 212.

¹⁶⁸ See Council Regulation 2026/97, OJ 21/10.97 L288/1, replacing Council Regulation 3284/94, OJ 31.12.94 L349/22, as amended by Council Regulation 1252/95, OJ 2.6.95 L122/2.

¹⁶⁹ Op. cit. footnote no. 87, at page 212.

¹⁷⁰ Ibid. at page 212.

¹⁷¹ Article 2.8. Council Regulation No. 384/96 of 22 December 1995, OJ L 56, 06/03/1996 p.1.

either no export price, or an export price which may be distorted, then pursuant to Article 2(9) of the Regulation, the export price is then to be calculated "on the basis of the price at which the imported products are first resold to an independent buyer, or, if the products are not resold to an independent buyer, or are not resold in the condition in which they were imported, on any reasonable basis". The issue of the distortion of export prices arose with regard to *Electronic Weighting Scales Originating in Singapore and the Republic of Korea*.¹⁷² In this case the relevant sale was between two related companies, with consequent distortion of costs incurred by the parties. Here the normal price for the goods was to be deduced from the price paid by "the first independent buyer", and adjusted by the costs of the related company.¹⁷³

In calculating the value of goods, the EC has been operating an "asymmetry methodology" in "comparing export price and normal value",¹⁷⁴ which ran into problems with the WTO, and surfaced in the panel report on *EC-Anti-Duties on Audio Tapes in Cassettes Originating in Japan*.¹⁷⁵ The EC had assumed that all markets operated on the basis of "the ideal perfect market" which "the Community was supposed to be", thereby punishing exporters from the non-plural Japanese market, where "transactions between producers" and distributors may not have been operating as if they were unconnected companies, but rather was based on "cohesive" groups of companies covering the entire chain of sale, from the manufacturer to the ultimate retailer.¹⁷⁶ This discrimination arose as a consequence of the post-Tokyo practice of the EC of not allowing for adjustments for indirect costs¹⁷⁷ of domestic selling subsidiaries¹⁷⁸ when netting back from the "price paid by the first independent buyer" to the export cost from the exporting

¹⁷² OJ 1993 L263/1, also reported as Case C-6/94R *Descom Scales Manufacturing Co. Ltd. v. Council*, [1994] ECR page I-867.

¹⁷³ Molyneux, Candido Garcia: Establishing the Rules of the Game: Domestic Structures and Unfair Trade Instruments, Ch 4, in Snyder, Francis (Ed.); *Regional and Global Regulation of International Trade* Hart Publishing, Oxford - Portland Oregon 2002-11-27, at page 118.

¹⁷⁴ Ibid. at page 119.

¹⁷⁵ *EC-Anti-Duties on Audio Tapes in Cassettes Originating in Japan*, ASP/ 136, 8 April 1995.

¹⁷⁶ Op. cit. footnote no. 173 at page 113.

¹⁷⁷ Pursuant to Art. 2(10)(c.) and (d.) of Council regulation no. 3017/79, OJ 1979 L339/1.

¹⁷⁸ Op. cit. footnote no. 173, at page 118.

country, the costs incurred further down the chain of supply in order to calculate the notional arms length "transaction value" upon export, to be used for valuation for customs purposes. As a consequence the "export price was established at the ex-factory level", (with certain expenses, such as transport, insurance, handling and specified ancillary costs permitted) "whereas the normal value included the indirect costs" of related subsidiaries, together with their notional profit margins.¹⁷⁹ This approach to calculation had been challenged in the ECJ, but upheld,¹⁸⁰ the ECJ recognising that the EC operated different procedures in attaining a valuation for customs purposes to the GATT.¹⁸¹ While the EC had tried to modify its practices, the issue of valuation, and its allied anti-dumping issues proved to be highly contentious during the Uruguay Round negotiations.¹⁸²

9.1 Audio tapes in cassettes panel¹⁸³

The panel report on in *Audio Tapes in Cassettes Originating in Japan* was decided on the basis of the Tokyo anti-dumping code. Article 2 of that Code provided that "a fair determination" was required of dumping.¹⁸⁴ It was argued that fairness therefore required the comparison of "like with like", which would require that if one country's imports was to have particular adjustments to its export price, then the domestic price with which it was being compared for the purposes of a dumping determination would have to undergo similar calculations.¹⁸⁵ The EC's argument¹⁸⁶ was that "there was no such symmetry requirement" in the Tokyo round anti-dumping code.¹⁸⁷ The panel's report, while confusing, held that differences in costs and profit calculations could affect comparability of prices, and that as the EC laws only permitted an "exhaustive list

¹⁷⁹ Ibid. at page 120.

¹⁸⁰ Case 204/84 *Toyo Bearing v. Council* [1987] ECR 1809.

¹⁸¹ Op. cit. footnote no. 173, at page 120 et seq.

¹⁸² Ibid. at page 121.

¹⁸³ Op. cit. footnote no. 175.

¹⁸⁴ Op. cit. footnote no. 173, at page 123.

¹⁸⁵ Ibid. at page 119 et seq.

¹⁸⁶ The main point at issue in this case was the definition of dumping.

¹⁸⁷ Op. cit. footnote no. 173, at page 123.

of adjustment items which did not include the indirect costs of the distribution subsidiaries" then the EC provisions were in breach of the GATT anti-dumping code.¹⁸⁸

9.2 Implementation of the panel report in the Community

The finding of the panel "was shock for the Community" despite the fact that the Community only lost on the asymmetry argument.¹⁸⁹ A number of new provisions were introduced to the Community's regulation of valuation for customs purposes. One provision¹⁹⁰ recognised that there might be differing levels of trade, and how to allow for the impact of this factor in the valuation calculation. In particular, the Community was obliged to introduce a new Article 2(10)k which provided for differences to be made for "other factors not provided for under subparagraphs (a)-(j)" of Article 2(10) of Council Regulation 384/96,¹⁹¹ if it could be shown that "they affect price comparability", showing that "customers consistently pay different prices on the domestic market because of the difference in such factors".¹⁹² These developments in the non-agricultural sector could soon be impacting on the agricultural sector given the expiration of Article 13 of the Agreement on Agriculture's peace clause.

9.3 Export Subsidies

Export subsidies, for their part, are generally regarded as "one of the most disruptive elements in the operation of world markets",¹⁹³ and it is perhaps for that reason that they are covered by a number of articles in a number of the

¹⁸⁸ Ibid. at page 124.

¹⁸⁹ Ibid. at page 124.

¹⁹⁰ The new Article 2(10)d of the regulation.

¹⁹¹ Council Regulation No. 384/96 (OJ 1996 L56/6), as amended by Council Regulation No. 2331/96 (OJ 1996 L317/1)

¹⁹² Op. cit. footnote no. 173, at page 127 et seq.

¹⁹³ Chambovey, Didier; "How the Expiry of the Peace Clause (article 13 of the WTO Agreement on Agriculture) Might Alter Disciplines on Agricultural Subsidies in the WTO Framework, *Journal of World Trade* 36(2): 302-352, 2002, at page 348.

Uruguay Round agreements. The exact relationship between these provisions, however, merits examination. Agricultural commodities, along with other primary commodities, are treated differently from non-primary commodities, for export subsidies, by virtue of Article XVI.B.3 of GATT. The WTO regulation of subsidies for export of agricultural products is regulated, however, by two Uruguay Round documents, the Agreement on Agriculture, under Article 8, and the Agreement on Subsidies and Countervailing Measures, under Article 3.1. Added to these provisions is the potential impact of the expiration of the Article 13 peace clause.¹⁹⁴ The test of not "more than an equitable share of world export trade in that product", under Article XVI:3 GATT 47, must be met for export subsidies to be permitted for agricultural goods, resulting in the consequence that a normal price for agricultural goods on the world export market would be regarded as a dumping price for manufactured goods. There is also, however, a requirement, to reduce export subsidies, in line with agreed commitments, pursuant to Article 3.3 of the Agreement on Agriculture.

The interrelationship between Article 8 of the Agreement on Agriculture and Article 3.1 of the Agreement on Subsidies and Countervailing Measures was addressed by both the Panel¹⁹⁵ and the Appellate Body¹⁹⁶ in the *Canada - Dairy Products* case. In the Panel report it was stated that the Agreement on Agriculture does permit the use of export subsidies, but "only within the limits of the budgetary outlay and quantity commitments levels" in the relevant Member States WTO schedules.¹⁹⁷ The Appellate Body adopted a similar line when it provided that export subsidies for agricultural products had to be first examined against the provisions of the Agreement on Agriculture, and only if they did not fall within

¹⁹⁴ Discussed later in this part, and referred to further in chapter 4, and analysed in depth, in the context of the synergy of EC and WTO provisions in the area of agriculture, in chapter 7.

¹⁹⁵ *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*. Report of the panel, WT/DS103/R, WT/DS113/R, 17 May 1999, para. 7.20.

¹⁹⁶ *Canada - Measures affecting the Importation of Milk and the Exportation of Dairy Products*, Recourse to Article 21.5 of the DSU by New Zealand and the United States, Report of the Appellate Body, WT/DS103/AB/RW, WT/DS113AB/RW, 3 December 2001, para. 123.

¹⁹⁷ Op. cit. footnote no. 193, at page 347, footnote no. 102.

the provisions of that Agreement were they then to be addressed by Article 3.1 of the Agreement on Subsidies and Countervailing Measures.¹⁹⁸

A question therefore arises as to the role and function of Article 13 of the Agreement on Agriculture, and the effect of its expiration. A problem arises in the interpretation of this provision in the context of the aforementioned provisions, to the extent that Chambovey is of the opinion that the Article 13 provisions appear to "be reduced to inutility", its interpretation thereby being "dissonant with the principle of effectiveness in the interpretation of treaties",¹⁹⁹ with the expiry of the peace clause of Article 13 having no effect on the pre-existing relationship between Article 8 of the Agreement on Agriculture and Article 3.1 of the Agreement of Subsidies and Countervailing Measures. However, as pointed out by Chambovey, Agricultural export subsidies, while protected from Article 3.1 of the SCM agreement, could still be actionable under Article XVI GATT.²⁰⁰ As to the expiration of Article 13 on the framework of WTO agreements affecting agricultural commodities, and the impact of that framework on the EC CAP, see further chapters 4 and 7 respectively.

With a view to the future, there is an agreement amongst the WTO member states to "work toward the development of internationally agreed disciplines" dealing with "export credits, export credit guarantees or insurance programmes", and once such agreement is reached to "provide export credits, export credit guarantees or insurance programmes only in conformity therewith".²⁰¹ Such an agreement at the WTO has yet to be reached, as the current Millennium Round of negotiations is still ongoing, with little substantive agreement emerging to date.²⁰²

¹⁹⁸ Ibid. at page 347.

¹⁹⁹ Ibid. at page 348.

²⁰⁰ Ibid at page 315.

²⁰¹ Op. cit. footnote no. 87, at page 289.

²⁰² For a fuller discussion on the current round of WTO negotiations, see chapter 8.

10. Export Credit insurance

In contrast to other matters dealt with in this chapter, while the GATT and WTO agreements appear to have little impact on the EC's export credit insurance regimes, policy papers emanating from the OECD have been highly influential in this area, with export credit being "of great importance in international trade" of the EC, and seen as "a key instrument of commercial policy".²⁰³ Export credit insurance can, however, have a "significant influence on competition at the international level"²⁰⁴ and should the current efforts to develop a Competition code within the WTO framework come to pass, it is to be anticipated that export credit insurance will become subject to WTO regulation in the future. Internal EC competition law and state aid rules may also come into play should any such scheme be found to be discriminatory.²⁰⁵

EC regulation of member states' schemes of export credit insurance regulation originated from a 1960's Policy Co-ordination Group, which led to "co-ordination of credit insurance policies, guarantees and financial credits"²⁰⁶ pursuant to Council Decision 73/391/EEC,²⁰⁷ with Community norms in this area specified in Annex I to the decision. The OECD published "Arrangements on Guidelines for officially supported Export Credits",²⁰⁸ which were adopted by the EEC Council, in 1978, pursuant to Council Decision of April 1978²⁰⁹. This document was an "informal arrangement" which the Council deemed at the time unwise to publish, but which subsequently appeared in and adopted and published

²⁰³ Op. cit. footnote no. 87, at page 174.

²⁰⁴ Ibid. at page 174.

²⁰⁵ Ibid. at page 174.

²⁰⁶ Ibid. at page 175.

²⁰⁷ Council Decision 73/391, OJ 17.12.73 L347/1, amended by Council Decision 76/641, OJ 16.8.76 L223/25 and by the Accession Treaty of Spain and Portugal of 1985.

²⁰⁸ See further OECD; "The Export Credit Financing Systems in OECD Member Countries", 4th ed., May 1990.

²⁰⁹ This "was an informal arrangement" and this document never obtained an OJ reference as the "Council deemed its publication to be unwise". See further Op. cit footnote no. 83, at page 177.

consolidated text in 1992, as practices had come to be more predictable and formalised, with the provisions of the 1978 Decision “extended for an indefinite period”.²¹⁰ The OECD had further elaborated its position on the specific issue of tied aid and export credits when it published new rules on the topic in 1996.²¹¹ The current EC provision is now reflected in the Council Directive 98/29/EC on the “harmonizing the main provisions concerning export credit insurance for transactions with medium and long term cover”.²¹² This Directive is again based on OECD documentation, and deals with export credit insurance for goods or services being exported from EC member states, “in so far as this support is provided directly or indirectly for the account of, or with the support of one or more Member States, involving a total risk period of two years or more”.²¹³ The Directive covers support provided “directly or indirectly” for the export of goods or services, “involving a total risk period of two years or more”, but does not apply for “cover for bid, advance payment, performance and retention bonds”,²¹⁴ with the provisions of the Directive not only regulating the market in this area, but also implying terms into such regulated export credit contracts.

11. Export refunds

The Common Agricultural Policy had been set up with the system of export refunds and export levies being integral to the operation of the common organisations, rather than being part of the Community Customs Code.²¹⁵ This was clarified in the case of *Krüger GmbH v. Hauptzollamt Hamburg - Jonas*,²¹⁶ which confirmed that “one of the purposes of the Guarantee Section of the EAGGF”²¹⁷ was the financing of refunds on exports of agricultural commodities

²¹⁰ Op. cit. footnote no. 87, at page 177.

²¹¹ Ibid. at page 178.

²¹² Council Directive 98/29, OJ 19.5.98 L148/22.

²¹³ Op. cit. footnote no. 87, at page 180.

²¹⁴ Article 1 of Council Directive 98/29, OJ 19.5.98 L148/22.

²¹⁵ Op. cit. footnote no. 87, at page 172 et seq.

²¹⁶ Case C-334/95 *Krüger GmbH v. Hauptzollamt Hamburg-Jonas* [1998] 1 CMLR 520.

²¹⁷ Op. cit. footnote no. 87, at page 295.

to third countries, pursuant to Council Regulation 729/70.²¹⁸ The issue of export refunds has been a bone of contention between the EC and its trading partners.²¹⁹ Payment of an export refund was made when the Community price for an agricultural commodity covered by a common organisation was higher than the open market price for the same commodity. The difference between the world market price and the Community price, which arose from the intervention system operated by the EC, was recovered as an export refund by the exporter from the EC.²²⁰ Less frequently used, but also operable, were export levies,²²¹ which operated when the Community price for a particular commodity was lower than the open market price. Here the Community charged a levy on the difference, in an effort to “discourage Community producers and traders from exporting products” which were in short supply within the Community.²²² Export refunds are usually claimed “after the completion of customs export formalities” and “on proof that the product had reached its destination” or had “left the geographical territory of the Community”,²²³ with no refund being made for goods which had not reached their destination in marketable quality, or if they were supposed to be fit for human consumption, if there were unfit.

The EC’s export refund mechanism has been classified, along with “sale for export of surplus intervention stocks at a price lower than the domestic price”,²²⁴ as an export subsidy in GATT and WTO documentation. While some commentators have argued that export subsidies were “accepted in principle” as being GATT compliant during the Dillon round of negotiations,²²⁵ Article XVI GATT 1947 required its Contracting Parties to “seek to avoid the use of subsidies on the export of primary produce”, recognising that the granting of an export

²¹⁸ Council Regulation 729/70 Art 1(2)(a), OJ L94/13.

²¹⁹ *Op. cit.* footnote no. 145, at page 85.

²²⁰ *Op. cit.* footnote no. 87, at page 295.

²²¹ referred to earlier in this chapter, in the part entitled “Agricultural Aspects of the Common Commercial Policy”.

²²² *Op. cit.* footnote no. 87, at page 299.

²²³ *Ibid.* at page 296.

²²⁴ *Op. cit.* footnote no. 145, at page 77.

²²⁵ *Ibid.* at page 74.

subsidy “of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this agreement”. While export subsidies continued to be permitted, they could only be used in a way which did not result in a “Contracting Party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade.”²²⁶ The concept of “more than an equitable share” of the market was addressed in Article 10 of the Tokyo round’s Subsidies Code, as “any case in which the effect of an export subsidy granted by a signatory is to displace the exports of another signatory bearing in mind developments in world markets”.²²⁷

The WTO Agreement on Agriculture, Article 9, brought new disciplines to play in the area of export subsidies, requiring their reduction, but not as yet their elimination.²²⁸ Changes were made in the EC’s export refund mechanism as a result of the Uruguay Round Agreement on Agriculture, as reflected in Council Regulation (EC) No. 3290/94,²²⁹ with the current provisions for cereals in the post mid-term review era being set out in Council Regulation (EC) No. 1784/2003.²³⁰ Advance fixing of export refunds, fixed according to destination,²³¹ is now the general rule, set subject to the obtaining of an export licence,²³² with the level of refund to be “adjusted in line with the level of the monthly increases applicable to the intervention price”.²³³ An exception has been made for food aid,²³⁴ as defined by Article 10(4) of the WTO Agreement on Agriculture.²³⁵

²²⁶ Article XVI (3) GATT 1947.

²²⁷ *Op. cit.* footnote no. 145, at page 75.

²²⁸ *Ibid.* at page 75.

²²⁹ *Op. cit.* footnote no. 50.

²³⁰ *Op. cit.* footnote no. 52.

²³¹ Article 13.3 of Council Regulation (EC) No. 1784/2003.

²³² *Op. cit.* footnote no. 87, at page 289 et seq.

²³³ Article 15 of Council Regulation (EC) No. 1784/2003.

²³⁴ Under Article 14.4 of Council Regulation (EC) No. 1784/2003.

²³⁵ *Op. cit.* footnote no. 87, at page 289.

12. Euro/non-euro currency

In order to complete the picture with regard to the payments of *inter alia*, the current duties, subsidies and single farm payments, together with their precursor payments, discussed earlier in this chapter, together with the payments discussed in chapter 2 to include the payment of current intervention prices, it is worth discussing briefly the EC's monetary and supporting structure. Prior to the launch of the Euro, in order to centrally regulate any of the markets in agricultural produce, in the absence of a common currency in Member States, regard had to be had to the different currencies in the Member States, and their constant fluctuations. An "agrimonetary" system was therefore invented. This was originally set up in 1962, and prior to the coming into force of the Euro, it was governed by virtue of Council Regulation 3813/92,²³⁶ and Commission Regulation 3819/92 as amended. With the coming into force of the Euro pursuant to Council Regulation (EC) No. 974/98²³⁷ it was felt that the pre-Euro agrimonetary system was "incompatible with the introduction of the Euro",²³⁸ so a new mechanism was implemented pursuant to Council Regulation (EC) No. 2799/98, with the pre-euro agrimonetary system provisions being repealed.²³⁹

The EC's agrimonetary system had originally been based on the European Community's Unit of Account (UA), which was subsequently replaced by the ECU, or European Currency Unit, which in turn has given way to the Euro. During the period of the EC's Unit of Account, the rate of exchange between the Unit of Account and the national currency, the "representative" rate, became

²³⁶ Council Regulation (EEC) No 3813/92 of 28 December 1992 on the unit of account and the conversion rates to be applied for the purposes of the common agricultural policy, Official Journal L 387, 31/12/1992 p. 1.

²³⁷ Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro, Official Journal L 139, 11/05/1998 p. 1.

²³⁸ Council Regulation (EC) No 2799/98 of 15 December 1998 establishing agrimonetary arrangements for the euro, Official Journal L 349, 24/12/1998 p. 1.

²³⁹ Ibid.

known as the Green rate.²⁴⁰ With respect to Great Britain this, subsequent to accession, became known as the Green Pound, and in Ireland, the Green Punt. The UA was originally tied to the gold value of the US dollar,²⁴¹ but, with the collapse of the fixed exchange rates in 1971,²⁴² it was re-valued against an average of specified European Currencies, “Joint Float” countries. It was soon discovered, however, that while national governments were prepared to devalue their national currencies, they were not prepared to devalue their green currency accordingly, as this would have an adverse affect on the potential income of their farmers. As a result the Community was obliged to introduce Monetary Compensatory Amounts (MCA’s) in order to avoid a possible distortion in the market. The calculation of green currencies as a result got more and more complicated, resulting in growing distortions in the market operating against the interests of poorer countries in favour of wealthier countries. MCA’s operated as levies against exports of produce from the devalued currency country, and as subsidies against its imports. They operated in the reverse in non-devalued countries.²⁴³ All of these factors had an impact on the implementation of the “common price policy” in agriculture, and the “development of common organisations based on prices” within the CAP.²⁴⁴ The system of MCAs was considered unsatisfactory and from 1989 onwards, after a “conscious effort” to dismantle MCA’s very little reliance was made on MCAs’.²⁴⁵ MCA’s were eventually eliminated in the 1992 agrimonetary reforms.

A new agrimonetary system was introduced in 1992, coming into force on the 1st of January 1993, pursuant to Council Regulation 3813/92 and Commission Regulation 3819/92 as amended. Green rates continued in existence, but for

²⁴⁰ Marsh and Swanney; *Agriculture and the European Community*, Allen and Unwin [for the] University Association for Contemporary European Studies, London, 1980, at page 31.

²⁴¹ *Op. cit* footnote no. 145, at page 113.

²⁴² *Ibid.* at page 113.

²⁴³ Melchor, Michael; *European Perspectives: 30 years of Community Law*, Commission of the European Communities, 1983.

²⁴⁴ *Op. cit.* footnote no. 145, at page 113.

²⁴⁵ *Ibid.* at page 114.

countries with currencies outside the narrow ERM²⁴⁶ band (when it existed) the green rates shadowed their market rates, never being allowed to deviate more than 2% from them. The green rate, therefore, matched the current currency rate, and could be re-valued as often as the national currency. Currencies within the narrow band (of 2.5%) were only moved with re-alignment. Towards the end of this EMU period the narrow band for currency fluctuation had, in practice, ceased to operate.

In the post Euro environment the law of agrimonetary arrangements is contained in Council Regulation 2799/98, as subsequently amended,²⁴⁷ and applied by Commission Regulation (EC) No. 2808/98,²⁴⁸ being provided for pursuant to Commission Regulation (EC) No. 807/1999.²⁴⁹ The upshot of these changes is that the problems of the agrimonetary system have now “largely disappeared with the introduction of the Euro”,²⁵⁰ with all monetary amounts being fixed and administered in Euro. For non-Eurozone member states, the businesses and individuals located in the non-Eurozone areas of the EU continue to have to face exchange rate risks, unless protected by the provisions of Council Regulation 2800/98,²⁵¹ which provides “general transitional arrangements where the conversion rate or exchange rate for the Euro on 1 January 1999 represented an ‘appreciable revaluation’ against the agricultural conversion rate in force on 31 December 1998”.²⁵²

²⁴⁶ Exchange Rate Mechanism.

²⁴⁷ For fishery payments pursuant to Council Regulation (EC) No 2801/98 of 14 December 1998 amending Regulation (EC) No 45/98 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for 1998 and certain conditions under which they may be fished, Official Journal L 349, 24/12/1998 p. 10.

²⁴⁸ Commission Regulation (EC) No 2808/98 of 22 December 1998 laying down detailed rules for the application of the agrimonetary system for the euro in agriculture, Official Journal L 349, 24/12/1998 p. 36.

²⁴⁹ Commission Regulation (EC) No 807/1999 of 16 April 1999 providing for transitional measures for the financing of inspections and controls in accordance with Directive 85/73/EEC following the introduction of the euro, Official Journal L 102, 17/04/1999 p. 68.

²⁵⁰ Op. cit. footnote no. 145, at page 124.

²⁵¹ Commission Regulation (EC) No 2813/98 of 22 December 1998 laying down detailed rules for applying the transitional measures for the introduction of the euro to the common agricultural policy, Official Journal L 349, 24/12/1998 p. 48.

²⁵² Op. cit. footnote no. 145, at page 124.

13. SPS provisions of the EC

Complementing the above examined monetary structures which operate at the EC's external frontier is a further requirement for the importation of goods generally, and agricultural goods in particular, into the EC market, the EC's sanitary and phyto-sanitary provisions. The EC's Sanitary and Phytosanitary (SPS) measures, as reflected in a Council Decision of 22 December 1994²⁵³ are subject to the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement),²⁵⁴ which is contained in Annex 1A of the Agreement Establishing the World Trade Organisation. This latter Agreement, for its part, will be examined in detail in chapter 4, with this part of this chapter briefly introducing the EC's SPS regulatory framework.

Prior to the coming into force of the WTO SPS Agreement the EC had adopted the International Convention on the Harmonization of Frontier Controls of Goods,²⁵⁵ which dealt with both veterinary and phytosanitary inspections.²⁵⁶ These provisions have since been superseded by the post –WTO Council Directives 2000/29/EC²⁵⁷ and 2002/89/EC²⁵⁸ for the protection of plants and plant products. Council Directive 2000/29/EC²⁵⁹ “sets out the Community plant health regime” with allied “phytosanitary conditions, procedures and formalities to which plants and plant products are” to be subjected, either when moving around

²⁵³ Council Decision 94/800/EC concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986- 1994), Official Journal L 336, 23/12/1994 p. 1.

²⁵⁴ <http://www.wto.org>, and also published at OJ L 336, 23.12.1994 at page 40.

²⁵⁵ Geneva, 21st October 1982, available at <http://www.unece.org>.

²⁵⁶ Official Journal L 126, 12/05/1984 p. 3.

²⁵⁷ Council Directive 2002/89/EC of 28 November 2002 amending Directive 2000/29/EC on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community Official Journal L 355, 30/12/2002 p. 45.

²⁵⁸ Ibid.

²⁵⁹ Which has been subject to various amendments.

the internal market, or when being introduced into the EC.²⁶⁰ Under the EC regime phytosanitary procedures have to be completed prior to obtaining customs clearance, with a mechanism in place for plant material to be accompanied by phytosanitary certificates issued by member states according to the standards set out in the International Plant Protection Convention (IPPC) of the UN's Food and Agriculture Organisation (FAO).²⁶¹ It is recognised in Council Directive 2002/89/EC that there is a requirement under Article 4 of the WTO's SPS Agreement that "the Community must recognise, under certain conditions, the equivalence of phytosanitary measures of other parties to that Agreement",²⁶² with the procedures for such recognition to be those set out in Council Directive 2002/89/EC.

The provisions for inspections of animals and animal products are more disparate. Commission Decision No. 98/140/EC²⁶³ provides an overarching framework for on the spot checks by Commission veterinary inspectors in third countries, in collaboration with the veterinary experts of EC member states. Article 2 of this Decision provides that the Commission "shall establish a general programme of checks", which was submitted to the EC's Standing Veterinary Committee for "an exchange of views." Article 1 of the Decision provides that the provisions of this Decision "shall apply without prejudice to the provisions of any agreement on sanitary measures applicable to trade in live animals and animal products reached between the European Community and third countries".

²⁶⁰ Council Directive 2002/89/EC of 28 November 2002 amending Directive 2000/29/EC on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community Official Journal L 355, 30/12/2002 p. 45, at recital 1.

²⁶¹ <http://www.fao.org>.

²⁶² At recital no. 13.

²⁶³ Commission Decision 98/140/EC of the 4 February 1998 laying down certain detailed rules concerning on-the-spot checks carried out in the veterinary field by Commission experts in third countries, Official Journal L 38, 12/02/1998 p. 14.

The pre-existing Commission Decision 86/474/EEC²⁶⁴ covering on-the-spot inspections of bovine animals and swine and fresh meat continues to apply. This is now to be complemented by European Parliament and Council Directive 2003/99/EC²⁶⁵ which was passed to “ensure that zoonoses, zoonotic agents and related antimicrobial resistance are properly monitored” and that “food-borne outbreaks receive proper epidemiological investigation”.²⁶⁶ In addition Council Directive 93/119/EC,²⁶⁷ deals with the protection of “animals at the time of slaughter or killings”. Council Decision No. 98/140/EC recognises the requirement in Article 8 and Annex c, paragraph 1(d) of the WTO SPS Agreement for confidentiality in the “operation of control, inspection and approval procedures.... in a way that legitimate commercial interests are protected”. These provisions are complemented by Council Regulation (EC) No 1308/1999,²⁶⁸ which deals with maximum residue limits of veterinary medicinal products in foodstuffs of animal origin. Of relevance in this area would also be Regulation (EC) No. 178/2002,²⁶⁹ which set out the “general principles and requirements of food law”, and established the European Food Safety Authority.

The drafting and interpretation of EC SPS provisions, to the extent that they address issues of risk assessment and risk management have already, and will increasingly in the future, become subject to WTO recognition or otherwise of the precautionary principle. The issue of the operation of the precautionary principle within the EC jurisdiction was addressed in the *Pfizer Animal Health SA*

²⁶⁴ Commission Decision 86/474/EEC of 11 September 1986 on the implementation of the on-the-spot inspections to be carried out in respect of the importation of bovine animals and swine and fresh meat from non-member countries, Official Journal L 279, 30/09/1986 p. 55.

²⁶⁵ Directive 2003/99/EC of the European Parliament and of the Council of 17 November 2003 on the monitoring of zoonoses and zoonotic agents, amending Council Decision 90/424/EEC and repealing Council Directive 92/117/EEC, Official Journal L 325, 12/12/2003 p. 31.

²⁶⁶ At Article 1 of European Parliament and Council Directive 2003/99/EC.

²⁶⁷ Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing, Official Journal L 340, 31/12/1993 p. 21, as amended.

²⁶⁸ Council Regulation (EC) No 1308/1999 amending Regulation (EC) 2377/90 laying down a Community procedure for the establishment of maximum residue limits of veterinary medicinal products in foodstuffs of animal origin, OJ. L 156, 23/6/1999, page 1.

²⁶⁹ Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, Official Journal L 31, 01/02/2002 p. 1, as amended.

case.²⁷⁰ Here the CFI found that given that the risk in that case had yet to be scientifically proven,²⁷¹ and in light of the fact that “neither the Treaty nor the secondary legislation” provided a definition of the precautionary principle,²⁷² risk assessment for the purposes of applying the principle must comprise a “two-fold task” being firstly, the determination of “what level of risk is deemed unacceptable” and secondly, the “conducting of a scientific assessment of the risks”.²⁷³ In light of this requirement the CFI held that the EC institutions “enjoyed a broad discretion, in particular when determining the level of risk deemed unacceptable for society”. The role of the judiciary was held to be confined to “ascertaining whether the exercise by the institutions of their discretion in that regard is vitiated by a manifest error or a misuse of powers or whether the institutions clearly exceeded the bounds of their discretion”.²⁷⁴ This approach could well be subjected to WTO panel or appellate body scrutiny given the differing approach to the precautionary principle in WTO documentation and jurisprudence. The WTO’s SPS agreement will be introduced in chapter 4, with the interaction of the WTO’s SPS Agreement with the EC’s provisions in this area analysed in chapter 8.

14. Charges for health inspections

The issue of charges for health inspections is relevant to both intra-community trade, and trade with third countries. The framework for regulation in this area was set out in Council Directive 85/73,²⁷⁵ with the current practice being set out in Council Directive 96/43/EC,²⁷⁶ as amended. The “principles governing

²⁷⁰ Case T-13/99, *Pfizer Animal Health SA v. Council of the European Union*, [2002] ECR page II-3305.

²⁷¹ At paragraph 113 of the judgment.

²⁷² At paragraph 117 of the judgment.

²⁷³ At paragraph 149 of the judgment.

²⁷⁴ At paragraph 169 of the judgment.

²⁷⁵ Council Directive 85/73/EEC of 29 January 1985 on the financing of health inspections and controls of fresh meat and poultrymeat, Official Journal L 32, 05/02/1985 p. 14.

²⁷⁶ Council Directive 96/43/EC of 26 June 1996 amending and consolidating Directive 85/73/EEC in order to ensure financing of veterinary inspections and controls on live animals and certain

the organization of veterinary checks” for products entering from third countries are set out in Council Directive 97/78/EC,²⁷⁷ as amended, with organising of veterinary checks for live animals and certain animal products being covered by Council Directive 91/496/EEC,²⁷⁸ as amended. The objective behind Council Regulation 96/43/EC was, recognising that many of the commodities being subject to health inspections were “covered by common organisations of the market”, and that different operators charging different fees for health checks “can lead to deflections to trade”, that there was a need for harmonisation of rules “on the financing of such inspections and checks”, with operators to make a contribution “to the financing of such inspections and checks.”²⁷⁹

A problem arises however, where a member state wishes to implement further health inspections than are required by EC law. The possibility of a member state implementing, and charging for, further health inspections was addressed and recognised in the case of *Feyrer v. Landkreis Rottal-Inn*,²⁸⁰ where, under an earlier EC health inspection charging regime, it was held that a trader could not claim a “directly effective right to pay the fees set out in the directive”.²⁸¹ It is to be anticipated that the health inspections conducted by member states in addition to those required under EC law would be those required under international conventions, such as the UN’s International Plant Protection Convention,²⁸² as in the case of *Commission v. Netherlands*,²⁸³ as these inspections were “not unilateral”, but were measures “intended to assist in the free

animal products and amending Directives 90/675/EEC and 91/496/EEC, Official Journal L 162, 01/07/1996 p. 1.

²⁷⁷ Council Directive 97/78/EC of 18 December 1997 laying down the principles governing the organisation of veterinary checks on products entering the Community from third countries, Official Journal L 24, 30/01/1998 p. 9.

²⁷⁸ Council Directive 91/496/EEC of 15 July 1991 laying down the principles governing the organization of veterinary checks on animals entering the Community from third countries and amending Directives 89/662/EEC, 90/425/EEC and 90/675/EEC, Official Journal L 268, 24/09/1991 p. 56.

²⁷⁹ Op. cit. footnote no. 276.

²⁸⁰ Case C-374/97 *Feyrer v. Landkreis Rottal-Inn* [1999] ECR I-5153.

²⁸¹ Op. cit. footnote no. 145, at page 31.

²⁸² Rome, 6 December 1951; TS 16 (1954); Cmd 9077.

²⁸³ Case 89/76 *Commission v. Netherlands* [1977] ECR 1355.

movement of goods”.²⁸⁴ The same case held, however, that health inspections and their associated charges which were “obstacles set up unilaterally” by an EC member state would not, however, meet with ECJ favour, and would be treated as “charges having an effect equivalent to customs duties”.²⁸⁵ Such a classification of “charges having an effect equivalent to customs duties” would be subject to the GATT and WTO Agreement on Agriculture provisions, and could be incompatible with either the EC’s or the individual member state’s commitments through its EC membership, under the WTO treaty texts. As pointed out by Usher, these additional health inspection payments could be contrary to the “requirements of the Common Commercial Policy and the Common Customs Tariff”, that “third countries should be subject to uniform treatment”.²⁸⁶ A solution to this situation may be found in the case of *IFG Intercontinentale Fleischhandelsgesellschaft mbH & Co. KG v. Freistaat Bayern*,²⁸⁷ to the effect that “there was no risk of diversion of trade if the charge for a health inspection” was not in excess of “the cost of the carrying out of the health inspection”.²⁸⁸ While this approach is adopted in the post Council Directive 96/43/EC version of Council Directive 85/73,²⁸⁹ with member states of the EC being “authorised to charge an amount exceeding the levels of Community fees provides that the total fees do not exceed the actual cost of inspection”,²⁹⁰ the issue of the profit margin for the health inspecting contractor is not addressed, nor is the issue of whether the additional payments when aggregated with existing customs duties, exceed WTO commitments on the “tariff rate quota”.²⁹¹

²⁸⁴ Op. cit. footnote no. 145, at page 31.

²⁸⁵ Ibid. at page 31.

²⁸⁶ Ibid. at page 32.

²⁸⁷ Case 1/83 *IFG Intercontinentale Fleischhandelsgesellschaft mbH & Co KG v. Freistaat Bayern* [1984] ECR 349.

²⁸⁸ Op. cit. footnote no. 145, at page 33.

²⁸⁹ Op. cit. footnote no. 276.

²⁹⁰ Op. cit. footnote no. 145, at page 33.

²⁹¹ See further Chapter 4.

15. Exceptions

The foregoing sets out the general system of import and export regulation operated by the EC covering agricultural commodities. A number of significant exceptions to the standard rules are however operated by the EC, and these merit some discussion. These exemptions include the EC's generalised system of preferences (GSP), its Lomé/Cotonou agreements, and its Euro Med Agreements.

15.1. Generalised System of Preferences

The EEC member states had operated a generalised system of preferences (GSP) for lesser developed countries (ldc) since the break up of their respective empires. The third countries within the EEC GSP scheme usually had colonial links with the EEC member states. These operated against a backdrop of a global system of generalised preferences sponsored by UNCTAD²⁹² (UNCTAD I) from 1964, whose objective was "to increase export earnings, promote industrialisation and accelerate the rates of economic growth of developing - country beneficiaries".²⁹³ These preferences were to be operated in favour of the ldc's by the developed countries, without any reciprocation by the ldc's in favour of the developed countries. The UNCTAD GSP built on pre-existing GSP systems operated by most developed countries, with the exception of the United States, but developed a new global, non-discriminatory system "to be offered to all ldc's

²⁹² "One of the principal functions of UNCTAD was to "formulate principles and policies on international trade and related problems of economic development" and to "make proposals for putting the said principles and policies into effect" " General Assembly Resolution 1955 (XIX), Proceedings of UNCTAD II, UN, New York (1968), vol. 1, report and Annexes, p. 4, quoted in Joseph M. McMahon "Agricultural Trade, Protectionism and the Problems of Development" Leicester University Press, 1992, at page 85.

²⁹³ Resolution 21(II), UNCTAD II, vol. 1, proceedings and report, UN, New York, (1968), page 38, quoted in McMahon, Joseph M.; "Agricultural Trade, Protectionism and the Problems of Development" Leicester University Press, 1992, at page 147.

without discrimination".²⁹⁴ These were "not to be reciprocated by the Idcs."²⁹⁵ This system was to operate in contradiction to the basic principle of MFN of the pre-existing GATT 1947. The GATT Tokyo Round addressed the issue of the UNCTAD GSP, which, although far from perfect in its operation, was facilitated by an Enabling Clause,²⁹⁶ which called for "developing countries to make contributions or concessions as their economies develop and improve".²⁹⁷ UNCTAD III,²⁹⁸ held in 1972, called for the GSP to be extended to include "processed and semi-processed agricultural and primary products in Chapters 1-24 of the Brussels Tariff Nomenclature²⁹⁹ (BTN)".³⁰⁰

The EEC adopted the GSP on the 1st July 1971,³⁰¹ before the GATT waiver had been obtained.³⁰² It is generally considered that the countries trading with the EC on the basis of the GSP only are in a preferential situation to only those countries which trade with the EC on the basis of the general provisions of "most favoured nation" basis, which operates under the GATT. Traditionally 59 signatories to the Lomé Convention were in a better position, however Lomé has now been replaced by Cotonou, of which more later in this chapter. In the non-agricultural goods sector, even the European Free Trade Association (EFTA)

²⁹⁴ Weston, Ann, Cable, Vincent and Hewitt, Adrian; *The EEC's Generalised System of Preferences, Evaluation and Recommendations*, Overseas Development Institute, UK, 1980, at page 5.

²⁹⁵ *Ibid.* at page 5.

²⁹⁶ BISD 26th Supplement (1980) p. 203, at p. 205. See further Annex 1 to this thesis. The provisions of this Enabling Clause were echoed at the Uruguay Round declaration at BISD 33rd Supplement (1987) pp. 19-27, at pg. 21.

²⁹⁷ *Op. cit.* footnote no. 76, at page 153.

²⁹⁸ Resolution 77 (III) of Proceedings of UNCTAD III, vol. 1, *Proceedings*, UN, New York, (1972), pp. 85-86.

²⁹⁹ Further the to the Nomenclature Convention of Brussels of the 15 December 1950, adopted into EC law by way of Council Regulation 950/68 of 28 June 1968 [1968] OJ Spec Ed (I) 275, together with the Annex attached thereto. The Brussels Tariff Nomenclature was replaced by the Harmonised Commodity Description and Coding System (HS) of the World Customs Organisation (WCO), on the 1st January 1988, which was discussed earlier in this chapter.

³⁰⁰ *Op. cit.* footnote no. 76, at page 159.

³⁰¹ *Inter alia*, Règlement (CEE) n°. 309/71 du Conseil, 21 juin 1971, portant ouverture de préférences tarifaires pour certains produits originaires de pays en voie de développement, O.J. (1971) L 142.

³⁰² *Op. cit.* footnote no. 76, at page 113.

countries are in a better position than the GSP countries,³⁰³ as are the dependent territories of the EU member states, new applicants for EU membership, and the Maghreb and Mashreq countries of the Euro-Mediterranean Partnership, and "other Mediterranean countries with special preferential trade agreements".³⁰⁴ In contrast to the Yaoundé and Lomé Conventions, the EC GSP is unilateral, with "no contractual commitment" being made by either the EC or any other GSP donor to "maintain preferences and market access to ldcs".³⁰⁵

Prior to the founding of the WTO the EC GSP system differentiated between agricultural and non-agricultural exports from ldcs, and further differentiated between "sensitive,"³⁰⁶ semi-sensitive or non-sensitive" goods.³⁰⁷ The EC imposed "*tariff quotas* (TQs) or *ceilings*" to the quantity of goods imported into the EC from ldcs.³⁰⁸ These tariff quotas are the maximum amount of that particular good to be imported into the EC as a whole, from the ldcs. A further restriction was imposed on ldcs by way of a "*butoir*.., or maximum country amount..".³⁰⁹ These *butoirs* could be set either at a very high level or a very low level, depending on the particular country, the intention being to "distribute the export benefits" by developing and regulating the competition between the ldcs, so as to prevent "the highly efficient ldc exporters from filling ceilings and TQs on their own".³¹⁰ Once an ldc had reached its *butoir*, MFN status would be re-imposed for the balance of its exports in that particular commodity classification.³¹¹ Cumulation of preferences for "treatment for originating status" was permitted only with a limited number of economic groupings,³¹² with EC GSP rules disallowing Community content.³¹³ Commodities imported from ldcs

³⁰³ Ibid. at page 134.

³⁰⁴ Op. cit. footnote no. 294, at page 25.

³⁰⁵ Ibid. at page 13.

³⁰⁶ Sensitive to the EEC's internal market.

³⁰⁷ Op. cit. footnote no. 294, at page 63.

³⁰⁸ Ibid. at page 13.

³⁰⁹ Ibid. at page 8.

³¹⁰ Ibid. at page 8.

³¹¹ Ibid. at page 9.

³¹² ASEAN, CACM and the Andean Pact.

³¹³ Op. cit. footnote no. 294, at page 27.

outwith the GSP commodity classifications remained on MFN status. The whole system benefited from the protection of a general safeguard clause, with the EC retaining the right "to suspend tariff preferences if they are deemed to be causing serious disruption of the domestic market".³¹⁴ The whole system operated "on the basis of documentation and not of good faith"³¹⁵ and involved considerable bureaucracy.

Agricultural product coverage was much more limited than that for non-agricultural products, with, initially only 145 products covered,³¹⁶ which was subsequently expanded to 300 products covered, with "less than a third of these.. [being] granted duty - free entry"; the balance benefiting from limited tariff reductions.³¹⁷ The approach of the GSP system for processed and semi-processed products "was based on the negative list philosophy" with all products included, unless specifically excluded, while GSP for agricultural goods and processed agricultural goods was "based on the positive list philosophy".³¹⁸ It is generally felt that the GSP scheme is "marginal as far as the agricultural sector is concerned," in particular as none of the products covered in the GSP "are likely to cause any disturbance to" CAP products.³¹⁹

The EC's GSP system did not have a "high utilisation rate" in comparison with the GSP scheme operated by non EC countries,³²⁰ partly as a result of the "most restrictive of all of the Community's many different origin rules", with originally, no allowing of any bilateral cumulation, and the zero tolerance of "small amounts of material originating from third States."³²¹ The GATT's Luetwiler Report³²² took a poor view of GSP systems generally, stating that the

³¹⁴ Ibid. at page 9.

³¹⁵ Ibid. at page 9.

³¹⁶ Op. cit. footnote no. 76, at page 133.

³¹⁷ Op. cit. footnote no. 294, at page 9.

³¹⁸ Op. cit. footnote no. 76, at page 133.

³¹⁹ Ibid. at page 139.

³²⁰ Ibid. at page 134.

³²¹ Peers, Steve; Reform of the European Community's Generalized System of Preferences, J.W.T. 1995 29(6) 79-96, at page 83 et seq.

³²² Trade Policies for a Better Future: Proposals for Action, GATT, Geneva (1985), p. 44.

"special treatment in the GATT Rules" was of "limited value", while "far greater emphasis should be placed" on the full integration of developing countries into the trading system "with all the appropriate rights and responsibilities that this entails".³²³

15.1.1 Post WTO - GSP system of the EC

Unlike the pre-WTO system, where GSP schemes operated differently for "industrial products, textiles, ECSC products and agricultural products"³²⁴ the post - WTO EC GSP³²⁵ is based on two regulations, one dealing with industrial goods,³²⁶ and the other with agricultural goods.³²⁷ The differentiation for agricultural products arises from the objective of the GSP to industrialised developing countries, and from the protectionist nature of the EC Common Agricultural Policy.³²⁸ The main intention of the changes to the EC GSP was the "complete abolition of tariff quotas and tariff ceilings",³²⁹ with the regulation³³⁰ creating a structure of four levels of tariff reductions.³³¹ The Council retained the ability to re-impose MFN tariffs "in exceptional circumstances" under Article 14, Regulation 3281/94.³³² More Southern African products were included while

³²³ Op. cit. footnote no. 76, at page 155.

³²⁴ Waer Paul and Driessen, Bart; "The New European Union Generalised System of Preferences A Workable Compromise in the EU - but a Better deal for Developing Countries? J.W. T. 1995, 29(4) 97-124, at page 119.

³²⁵ Relying on Article 133, ex. Article 133 EC.

³²⁶ Council Regulation (EC) No. 3281/94, 19 December 1994, applying a four-year scheme of generalised tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries, tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries, O.J. (1994) L348/1, corrigendum of 12 April 1995 in OJ. (1995) L 82/29.

³²⁷ Council Regulation (EC) No. 3282/94, 19 December 1994, extending into 1995 the application of regulations (EEC) No. 3833/90, (EEC) NO. 3835/90 and (EEC) No. 3900/91 applying generalised tariff preferences in respect of certain agricultural products originating in developing countries. O.J. (1994) L 348/57.

³²⁸ Op. cit. footnote no. 324, at page 119.

³²⁹ Op. cit. footnote no. 321, at page 85.

³³⁰ Article 2, Regulation 3281/94, referring to Annex 1, parts 1-4. Some products were excluded from receiving any benefits at all under Article 1(2), Regulation 3281/94, referring to Annex IX. These products included a number of primary products, as well as certain glue, leather, steel, aluminium and lead products, and some other metals. Op. cit. footnote no. 332, at page 86.

³³¹ 15, 30, 65 and 100 percent.

³³² Op. cit. footnote no. 321, at page 87.

partial graduation, out of the GSP system, back to the general MFN system, was introduced for wealthier developing countries.³³³

One of the other main changes to the EC GSP is the change to the EC GSP's rules of origin. While the rules remain substantially the same for the poorest states, amendments to the EC's Common Customs Code³³⁴ resulted in, in addition to "donor-country" cumulation being permitted in limited regional groupings, a "general tolerance for all third-country materials" of up to a maximum of 5% of ex-works value being introduced, with textiles and clothing excluded from this rule.³³⁵ A new Management Committee for EC GSP day to day issues was also set up.³³⁶

At the time of reform proposals (1990) a document issued from Vice-President Manuel Marín, which became to be known as the Marín Memorandum.³³⁷ This document suggested a scheme for extending the general GSP benefits for specific countries, which met particular requirements. These requirements included complying with a social clause, for an ldc to comply with

³³³ Ibid. at page 88.

³³⁴ The EC's Common Customs Code was set out in Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, Official Journal L 302, 19/10/1992 p. 1, and implemented by Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, Official Journal L 253, 11/10/1993 p. 1. The amendment allowing for donor country cumulation was set out in Article 72 of Regulation 2454/93, which was added by Regulation 3254/94, Commission Regulation (EC) No 3254/94 of 19 December 1994 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community customs code, Official Journal L 346, 31/12/1994 p. 1, which provides, inter alia, at Article 72 1. "Notwithstanding the provisions of Article 69, non-originating materials may be used in the manufacture of a given product, provided their total value does not exceed 5 % of the ex-works price of the final product and subject to the conditions laid down in Note 3.4 in Annex 14.

2. Paragraph 1 shall not apply to products falling within Chapters 50 to 63 of the Harmonized System."

³³⁵ Op. cit. footnote no. 321, at page 90.

³³⁶ Articles 17-19, Regulation 3281/94.

³³⁷ Memorandum from Mr Marín to the Commission, Integration of developing countries into the international trading system: Role of the GSP and other co-operation instruments, 1995-2004, unpublished. See further OP cit. footnote no. 335, at page 100.

the provisions of Conventions no. 87³³⁸ and 98³³⁹ of the International Labour Organization, (ILO) an environmental clause, requiring compliance with the criteria of the International Tropical Timber Organization (ITTO), and the International Monetary Fund (IMF) criteria, and a drugs provision, for countries, such as those in the Andean Pact and the Central American countries, who wanted "help in the fight against drugs".³⁴⁰ These provisions were brought in, for both agricultural goods and non-agricultural goods by Council Regulation 1154/98,³⁴¹ and was further elaborated on in Council Regulation 2820/98³⁴².³⁴³ The regulation currently in force for all goods except armaments, is Council Regulation (EC) No. 2501/2001,³⁴⁴ as amended. The benefits obtained by the beneficiaries of the EC's GSP provision, in the absence of a "GATT GSP code, with World Trade Organisation dispute settlement", currently unlikely, are however, somewhat dubious, as Peers points out, that these benefits may come "with a price".³⁴⁵

15.2. Lomé/Cotonou

The relationship between the EC and the Afro Caribbean Pacific (ACP) States,³⁴⁶ is now governed by the Cotonou Agreement of 2000. This was preceded

³³⁸ C87 Freedom of Association and Protection of the Right to Organise Convention, 1948 Date of adoption:09:07:1948 <http://www.ilo.org>.

³³⁹ C98 Right to Organise and Collective Bargaining Convention, 1949 Date of adoption:01:07:1949 <http://www.ilo.org>.

³⁴⁰ Op. cit. footnote no. 324, at page 108.

³⁴¹ Council Regulation (EC) No 1154/98 of 25 May 1998 applying the special incentive arrangements concerning labour rights and environmental protection provided for in Articles 7 and 8 of Regulations (EC) No 3281/94 and (EC) No 1256/96 applying multiannual schemes of generalised tariff preferences in respect of certain industrial and agricultural products originating in developing countries Official Journal L 160, 04/06/1998 p. 1.

³⁴² Council Regulation (EC) No 2820/98 of 21 December 1998 applying a multiannual scheme of generalised tariff preferences for the period 1 July 1999 to 31 December 2001, Official Journal L 357, 30/12/1998 p. 1.

³⁴³ Op. cit. footnote no. 324, at page 207 et seq.

³⁴⁴ Council Regulation (EC) No. 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004, 31/12/2001, OJ L346/1.

³⁴⁵ Op. cit. footnote no. 321, at page 93.

³⁴⁶ Now 77 countries.

by four Lomé Conventions³⁴⁷ and two Yaoundé Conventions,³⁴⁸ the developing countries being then referred to as the Association of African States and Madagascar (AASM). The Yaoundé convention originated from the original part IV of the EEC Treaty, in particular the original Article 136 EEC,³⁴⁹ which was reinforced in "the Joint Declaration of Intent of April 1963," which was repeated in Protocol 22 of the UK Act of Accession to the EEC.³⁵⁰ Part IV of the EEC Treaty³⁵¹ was inserted at the "insistence of the French delegation" as a condition for participating in the EEC. At the time the colonies of the originating member states of the EEC were gaining independence. The then part IV of the EEC treaty was intended to facilitate trading relations between these new and emerging countries and their former colonial powers. The intention was progressively to abolish customs duties, and to prohibit quantitative restrictions on trade between the EEC and the Yaoundé convention states, pursuant to the then Articles 131-135 EEC, Articles 182 to 187 EC post Amsterdam.³⁵² The initial association period between the EEC and what were to become the AASM states ended with the achievement of political independence³⁵³ and the signing of the first Yaoundé convention. The legal basis for this agreement was Article 133 EC, (ex. Article 113 EC), but since then has been developed pursuant to Articles 177 (ex. Article 130u) to 181 (ex Article 130u) EC, which deal with development co-operation. The EC's Development Policy had been held, by the ECJ, as being a non-

³⁴⁷ 1995, 1979, 1984 and 1989.

³⁴⁸ 1963 and 1969.

³⁴⁹ The original version of Article 136 EEC provided; "For an initial period of five years after the entry into force of this Treaty, the details of and procedure for the association of the countries and territories with the Community shall be determined by an Implementing Convention annexed to this Treaty". A subsequent version of Article 136 EC, formerly Article 136a EEC, and now (post Amsterdam) Article 118 EC, deals with the EC's relationship with Greenland, providing that "The provisions of Articles 182 to 187 shall apply to Greenland, subject to the specific provisions for Greenland set out in the protocol on the special arrangements for Greenland, annexed to this Treaty."

³⁵⁰ McMahon J. "The Renegotiation of Lomé: inventing the future? (1989) 14 ELRev. 140, at page 140.

³⁵¹ Entitled "Association of the Overseas Countries and Territories," formerly Articles 131 to 136 EC, renumbered Articles 182 to 188 EC, post Amsterdam.

³⁵² Op. cit. footnote no. 350, at page 143 et seq.

³⁵³ Ibid at page 141.

exclusive competence of the EC,³⁵⁴ as is the relationship between the EC and the ACP states.³⁵⁵ In both the *Commission v. Council*³⁵⁶ and in *Opinion 1/94*³⁵⁷ the occupied field theory came into play. In these cases the ECJ stated that the EC had competence to legislate in the area of development policy, and when the EC had so legislated then the member states of the EC could not legislate contrary to any EC provisions.

The conclusion of the Yaoundé convention coincided with the development of the Common Agricultural Policy (CAP), which had an impact on the Yaoundé provisions for agricultural products. Initially only rice importation from the AASM countries was affected, but by Yaoundé II in 1969³⁵⁸ agricultural imports were gaining greater preference in accessing the EEC market than non-Yaoundé countries³⁵⁹ but were otherwise encountering barriers set up to protect the CAP. Free trade prevailed for industrial products from 1957, however the position regarding agricultural imports weakened with regard to "the level of preference given"³⁶⁰ over a period of time.³⁶¹ When the UK joined the EEC in 1973 it brought its traditional trading relations with its former colonies into the AASM framework, the new group of new and emerging countries being now referred to as the Afro-Caribbean-Pacific Countries (ACP),³⁶² with the treaties now being referred to as the Lomé Conventions. While the ACP countries were given preferences greater than the GSP countries, these preferences were weakening with time, with the progressive liberation of trade under GATT 1947, and the MFN concessions under GATT.

³⁵⁴ Joined Cases C-181/91 and C-248/91 *Parliament v. Council and Commission* [1993] ECR I-3685 (the *Bangladesh* case).

³⁵⁵ Case C-316/91 *Parliament v. Council* [1994] ECR I-625 (the *EDF* case).

³⁵⁶ Case 22/70 *Commission v. Council* [1971] ECR 263 (the *ERTA* case).

³⁵⁷ Op. cit. footnote no. 3.

³⁵⁸ Art. 2(2) Yaoundé II J.O. 1970 L 282/2.

³⁵⁹ Op. cit. footnote no.352, at page 141.

³⁶⁰ Ibid. at page 141.

³⁶¹ By virtue of Article "(2) of the convention, agricultural products were excluded from the general trade obligation of abolishing customs duties, quantitative restrictions and all measures having similar effects (JO 1970 L282/2)". Op. cit. footnote no. 361, at page 141.

³⁶² <http://www.acpsec.org/>.

In addition, unlike the GSP system, whose focus, as referred to above, is the industrialisation of developing countries, and whose drafting was affected by a protectionist approach to the developing CAP,³⁶³ with limited agricultural product coverage,³⁶⁴ and different GSP schemes for agricultural and non-agricultural products,³⁶⁵ the Lomé conventions were more agricultural in orientation. While GSP countries were developing their industrial commodity preferences, the ACP countries exported "hardly any manufactures",³⁶⁶ made greater use of their more liberal preferences for agricultural products.³⁶⁷

The issue of whether the Yaoundé and Lomé preferences were GATT compatible has been an issue "since the beginning of the development co-operation".³⁶⁸ This issue came to the fore with regard to the commodity of bananas. Lomé IV, which "guarantees.. duty-free imports into the Community subject to certain reserves" used to protect the CAP, has attached to it a Banana Protocol, which guaranteed "a market for ACP states' bananas",³⁶⁹ with a Common Organisation of the Market in Bananas³⁷⁰ being set up.³⁷¹ These provisions were highly controversial, and culminated, within the EC, in the ECJ case of *Commission v. Council*³⁷² with the German, Belgian and Dutch governments challenging this provision on the basis that it breached GATT 1947 rules. The ECJ in this case³⁷³ confirmed that GATT 1947 was an "integral part of the Community's legal order," with the ECJ being competent to interpret the provisions of GATT. However, the ECJ also held that GATT could not be "a

³⁶³ Op. cit. footnote no. 324, at page 119 et seq.

³⁶⁴ Op. cit. footnote no. 76, at page 133.

³⁶⁵ Op. cit. footnote no. 324, at page 105 et seq.

³⁶⁶ Op. cit. footnote no. 294, at page 27.

³⁶⁷ Op. cit. footnote no. 76, at page 180.

³⁶⁸ Op. cit. footnote no. 352, at page 144.

³⁶⁹ Ibid. at page 143.

³⁷⁰ The Common Organization of the Market in Bananas Council Regulation no. 404/93 of 13 Feb. 1993 on the Common Organization of the Market in Bananas, OJ 1993 L 47/1, at page 403.

³⁷¹ Everling U; Will Europe slip on Bananas? The Bananas judgment of the Court of Justice and National Courts, C.M.L. Rev. 1996, 33(3), 401-437, at page 403.

³⁷² Case 45/86, *Commission v. Council* [1987] ECR 1493.

³⁷³ See Chapter 6 for a further discussion of this case.

criterion for the examination of the legality of community acts".³⁷⁴ These particular provisions were subsequently challenged at the WTO level,³⁷⁵ in the context of EC's common organisation in bananas,³⁷⁶ which had been introduced in 1993.³⁷⁷ The EC was found,³⁷⁸ in its operation of the Lomé agreement, to be in breach of GATT provisions.³⁷⁹ The WTO finding³⁸⁰ eventually led to the redrafting of the ACP relationship, which resulted in the Cotonou Agreement of 2000.

The agreement currently in force is the aforementioned Cotonou Agreement. This agreement is based on a five pillar framework, to include, a political dimension, participation, focus on poverty reduction, financial co-operation, with funding from the European Development Fund and the European Investment Bank, and of relevance to this thesis, a new framework for economic and trade co-operation. The Cotonou Agreement, unlike its predecessors, has been drafted so that its trade provisions are fully in conformity with the WTO provisions. It should be noted that the Cotonou Agreement has still had to obtain the protection of an additional temporary conditional waiver, from the WTO, of the provisions of Article I,1 GATT,³⁸¹ which deals with the "most favoured nation" principle until the 31st December 2007 pursuant to a ministerial decision at the Doha Conference.³⁸² The potential impact of the expiration of said waiver, in the absence of its renewal, has yet to be established.

³⁷⁴ Op. cit. footnote no. 371, at page 421.

³⁷⁵ *European Communities - Regime for the Importation, Sale and Distribution of Bananas, complaints by Ecuador, Guatemala, Honduras, Mexico and the United States* (WT/DS 27).

³⁷⁶ Pursuant to Council Regulation 404/93, OJ 1993 L47/1.

³⁷⁷ Op. cit. footnote no. 145, at page 72.

³⁷⁸ By the Appellate Body, confirming the Panel's view, in *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R, 9 September 1997.

³⁷⁹ Mentioned again in chapter 5, but discussed in more detail in chapter 6.

³⁸⁰ For a fuller discussion of the case law in this area see further Chapter 5.

³⁸¹ Which deals with Most Favoured Nation Treatment.

³⁸² *European Communities - The ACP-EC Partnership Agreement*, Decision of 14 November 2001, WT/MIN (01)/15, Ministerial Conference fourth Session Doha, 9-14 November 2001.

15.3. Euro Med Agreements

The Euro-Mediterranean programme was set up pursuant to the Barcelona Declaration,³⁸³ which provided as its aim to "progressively (create) a zone of peace, stability and security in the Mediterranean". The objective was to establish a Euro-Mediterranean Economic Area (EMEA) through meshing bi-lateral agreements³⁸⁴ between the EC and the countries of the Maghreb³⁸⁵ and the Mashreq.³⁸⁶ This Euro-Mediterranean partnership continues to be under construction, and comprises three separate partnership areas, one based on politics and security, integrating with pillar II EU, in the establishment of a common area of peace and stability, one based on an economic and financial partnership, of interest to this thesis, and thirdly, a partnership based on social, cultural and human affairs. Financing under these agreements is pursuant to the MEDA financing initiatives,³⁸⁷ which comprises grants, risk capital and interest rate subsidies, with lending from the European Investment Bank (EIB).³⁸⁸ The whole package includes intellectual property and competition law provisions.

The Barcelona Declaration³⁸⁹ has its origins in numerous pre-existing co-operation initiatives, dealing with financial or technical measures, which were

³⁸³ Adopted at the Euro-Mediterranean Conference, 27th and 28th November 1995.

³⁸⁴ To include agreements with Tunisia (July 1995), Israel (November 1995), Morocco (February 1995), the West Bank and the Gaza Strip (February 1997) and Jordan (April 1997), and the Customs Union signed with Turkey (March 6 1995).

³⁸⁵ Tunisia, Morocco, Algeria.

³⁸⁶ Originally to include; Egypt, Lebanon, Israel, Jordan, Turkey, Cyprus, Malta, Syria, Palestinian Authority, although it should be noted, of course, that Cyprus and Malta have since become full members of the EU.

³⁸⁷ Council Regulation (EC) No. 1488/96 on financial and technical measures to accompany (MEDA) the reform of economic and social structures in the framework of the Euro-Mediterranean partnership, Official Journal L 189, 30/07/1996 p. 1

³⁸⁸ Communication by Vice President Marin to the Commission, "*Implementing MEDA 1996-1997 Report*"; which was submitted by the European Commission to the European Parliament and the Council pursuant to Article 15(1) of Council Regulation no 1488/96 (MEDA).

³⁸⁹ Barcelona Declaration, adopted at the Euro-Mediterranean Conference, 27th and 28th November 1995.

primarily developmental in nature.³⁹⁰ While some of these continue in existence, they are, for the most part, being phased out and being replaced by the MEDA financing initiatives,³⁹¹ under a new administrative structure.³⁹² The MEDA Programme is mostly made up of grants as well as risk capital and interest rate subsidies, and is supplemented by substantial lending by the European Investment Bank (the EIB). While earlier relations with the Euro-Mediterranean partners were, on occasion, treated as being sometimes developmental in nature and sometimes trade related,³⁹³ the current proposals in this area now go “beyond the framework of development co-operation and are destined to apply to countries which cannot be classified as developing countries”.³⁹⁴ Reliance must now be made exclusively on Article 308 EC, and what is now known as the Trade Directorate of the Commission, formerly DG1B.³⁹⁵

³⁹⁰ Pre existing laws include Council Regulation (EEC) No 1762/92 on the implementation of the protocols on financial and technical co-operation concluded by the Community with Mediterranean non-member countries, OJ L 181, 01/07/1992 p. 1, Council Regulation (EEC) no 1763/92 concerning financial co-operation in respect of all Mediterranean non-member countries for measures whose scope extended beyond the scope of a single country, OJ L 181, 01/07/1992 p. 5, Council Regulation (EC) no 1734/94 on financial and technical co-operation with the Occupied Territories Official Journal L 182, 16/07/1994 p. 4, and proposal Com (94) 289 final for a Council Regulation in the field of employment creation and support to small and micro-enterprises in the Maghreb countries, OJ C 214, 04/08/1994 p. 26

³⁹¹ Council Regulation (EC) No. 1488/96 on financial and technical measures to accompany (MEDA) the reform of economic and social structures in the framework of the Euro-Mediterranean Partnership, which is accompanied by Proposal for a Council Decision concerning the adoption of the guidelines for MEDA indicative programmes (COM (96) 441 final.

³⁹² Communication by Vice President Marin to the Commission, “*Implementing MEDA 1996-1997 Report*”; <http://www.euromed.net>, and COM (98) 524, which was submitted by the European Commission to the European Parliament and the Council pursuant to Article 15(1) of Council Regulation no 1488/96 (MEDA), with reference to Council Regulation (EC) no 1488/96 of 23.7.96 on financial and technical measures to accompany (MEDA) the reform of economic and social structures in the framework of the Euro-Mediterranean partnership. This regulation appears in OJ 1996 L 189/1, and entered into force on the 2 August 1996. The report goes on to state that from the 1st of January 1997, MEDA replaces the pre existing bilateral financial protocols including the regulations on horizontal co-operation (Regulation 1763/92/EEC) co-operation with the Occupied Territories (regulation 1734/94/EEC) and structural adjustment (Regulation 1762/92/EEC).”

³⁹³ with the development provisions falling under the Development Co-operation Articles 177 to 181, of the EC Treaty (post Amsterdam), as inserted by Article G (38) TEU.

³⁹⁴ Proposal for a Regulation on financial and technical measures to support the reform of economic and social structures in Mediterranean non-member countries and territories, OJ C 232, 6.9.1995, COM (95) 204.

³⁹⁵ Rather than the Development Directorate at DG VIII.

The Euro-Mediterranean agreements hold out no prospect of membership of the EC/EU,³⁹⁶ but rather the EC hopes to improve the wealth and stability (economic and political) of its southern borders, in order to “progressively (create) a zone of peace, stability and security in the Mediterranean”.³⁹⁷ The Committee of the Regions injects a note of realism into this highly idealistic process stating that it “must be recognised that the growing interest in the Mediterranean springs partly from the perceived risks which the steady increase in international and domestic tensions poses for the regions stability and security.”³⁹⁸ In effect the Euro-Mediterranean Partnership is a partnership predominately trade related, but inspired by the EU’s concerns as to the security of its borders, both from conflict and wars and from being subjected to an influx of economic and possibly illegal migrants.

The aim of Free Trade in Goods is the most clearly thought out policy in the partner agreements with third countries, as evidenced by the EC agreement with Tunisia,³⁹⁹ one of the most developed of the Euro-Med agreements. Here the agreement regarding duties and charges having equivalent effect for Industrial Produce is set out in detail in Articles 6 to 14. This situation is further elaborated on by way of Decision No 1/1999 of the EU-Tunisia Association Council,⁴⁰⁰ Article 9 of which provides that “products originating in Tunisia shall be imported into the Community free of customs duties and charges having equivalent effect and without quantitative restrictions or measures having equivalent effect.” This provision is to include “customs duties of a fiscal nature” under Article 13 of that decision. Goods imported into Tunisia from the EC are to benefit from the “progressive reduction of customs duties and charges having equivalent effect”

³⁹⁶ Unlike the Europe Agreements with the Central and Eastern European Countries.

³⁹⁷ Op. cit. footnote no. 389.

³⁹⁸ Opinion of the Committee of the Regions on the “Local Authorities and the Euro-Mediterranean partnership” OJ C 64, 27/2/98, page 59.

³⁹⁹ Euro-Mediterranean Agreement with the Republic of Tunisia, OJ L 97, 30/03/1998 p. 2

⁴⁰⁰ Decision No. 1/1999 of the EU-Tunisia Association Council of 25 October 1999 on the implementation of the provisions on processed agricultural products laid down in Article 10 of the Euro-Mediterranean Agreement establishing an association between the European communities and their Member States, of the one part, and the Republic of Tunisia, of the other part (1999/743/EC).

over a period of five to twelve years, depending on the particular commodity.⁴⁰¹ Agricultural goods are however treated differently, with agricultural goods provisions to be applied to agricultural components "mutatis mutandis".⁴⁰² Agricultural goods are to benefit from a gradual implementation of "greater liberalisation of their reciprocal trade" pursuant to Article 16, with differentiation of provisions being provided for different commodities under Article 17 of Decision no. 1/1999. The development of the Euro-Med agreements has not, however, been without controversy, with one case to date being the subject of GATT dispute resolution, the *Citrus* case,⁴⁰³ of which more in chapter 5.

16. Conclusion

It must be reaffirmed at this stage that the focus of this thesis is on the impact of the WTO Agreement on Agriculture on the EC Common Agricultural Policy, this particular discourse, started in chapter 2, and to be further developed in the fourth and subsequent chapters of the thesis. Nevertheless the areas covered in chapter 3 form the backdrop against which this interaction between the agricultural provisions at the WTO and the EC operates, and affects the reality of that interaction. It is acknowledged that many of the topics covered in this chapter could merit a PhD in themselves. However constraints of time and space have necessitated a limited acknowledgement of these issues, and their impact on the focus of this particular thesis. While the areas of EC law covered have already either been strongly influenced by WTO agreements or the WTO Dispute Settlement Procedure, not all of the relevant issues have as yet been clarified. It is to be expected that issues such as the EC GSP and Cotonou Agreements will continue to have an impact on the reality of global trade patterns in agricultural commodities; the expiration of the Cotonou waiver or the continuing evolution of

⁴⁰¹ Article 11 of Decision No. 1/1999 of the EU-Tunisia Association Council of 25 October 1999.

⁴⁰² Article 10 of Decision No. 1/1999 of the EU-Tunisia Association Council of 25 October 1999.

⁴⁰³ *European Communities – Tariff Preferences to Citrus Products of certain countries in the Mediterranean Region* (request for negotiations 8th August 1980, L5012).

the Euro-Med agreements will raise issues at the WTO again in the future. In addition, while the issue of export credit insurance has yet to feature in a WTO agreement, many of the other issues covered in this chapter may well be affected by the ongoing Millennium round of negotiations at the WTO, as their relevant GATT agreements are subject to scrutiny. The core WTO agreements dealing with agricultural commodities, together with their history and context will be examined in the next chapter, with the evolving body of caselaw of the WTO, and its predecessor, GATT 47 being examined in chapter 5.

Chapter 4

The WTO Agreement on Agriculture; its history and context

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- 2. GATT 1947 and its development**
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1. Introduction

The WTO Agreement on Agriculture is part of the Uruguay Round treaty texts, and has to be read in conjunction with the balance of the Annex 1A Agreements annexed to the Agreement establishing the WTO. In order to understand why there is a WTO Agreement on Agriculture it is necessary to understand why agricultural commodities are not considered to be adequately covered by the more mainstream GATT 1994, and why its predecessor GATT 1947 failed to liberalise international trade in agricultural commodities to the extent that it managed to liberalise the international trade in non-agricultural commodities. It is for this purpose that an introduction to the political backdrop to the evolution of the regulation of international trade in agricultural commodities will comprise the first part of this chapter, with the second part of the chapter introducing the actual contents of the WTO Agreement in Agriculture, and how it interacts with its associated WTO agreements.

The development of the current WTO Agreement on Agriculture was conducted against the continuing influence of the end of imperial colonialism, with, in the case of the UK, the operation of imperial and later a commonwealth preference system for agricultural products. This situation was reflected in the 1932 Ottawa agreement, "whereby Commonwealth imports to Great Britain obtained preferential treatment".¹ At a more global level, commodity agreements reflected the dominant ethos of the principal trading partners,² with wheat becoming an important global commodity. The International Wheat Agreements, ran from 1933 through to 1971,³ well into the GATT 1947 era, with the 1967

¹ Kock, Karin; *International Trade Policy and the GATT 1947-1967*, Almqvist & Wiksell, Stockholm, 1969, at page 1.

² A list of the commodity agreements which existed over the years is set out in Annex 2 to this thesis.

³ The International Wheat Agreements were in 1933, 1949, 1953, 1956, 1959, 1962, 1967 and 1971.

International Wheat Agreement being agreed within the GATT framework. The effect of a "huge wheat crop of 1928 and subsequent crop"⁴ had such a dramatic effect on the then global economy that a World Monetary and Economic Conference was called to address the problem. Newspaper headlines at the time were along the lines of "Too Much Wheat: A Burden on the World Economy: Is Planned Economy Inevitable?"⁵ The principle that higher payments to farmers would result in less being produced, allied with the growing need for self-sufficiency in wheat in the national interest during the period of food rationing during and after the second World War, resulted in structures which involved guaranteed sales and purchases, restrictions on productions, voluntary export restraints, and measures to promote consumption. The thinking which developed at the time strongly influenced the development of the EC's Common Agricultural Policy, and the development of exceptions to GATT 1947 for agricultural commodities, necessitating in due course, reform of the CAP, and at the global level, the 1994 WTO Agreement on Agriculture. The wheat agreements, in particular the 1942 agreement, with its origins at the Hot Springs Conference of 1942, was "regarded as the prototype for post-War arrangements in this and other fields"⁶; its "underlying principle was the fixing of maximum and minimum prices on guaranteed transactions."⁷ Wheat, primarily produced by a rich nations developed structures and mechanisms which were subsequently adopted for other temperate zone agricultural products, to the detriment of the developing and less-developed countries of the subsequent GATT/WTO multilateral trading system, consequences that we are still living with today.

⁴ Kabir-ur-Rahman Khan, *The Law and Organization of International Commodity Agreements*, Martinus Nijhoff Publishers, The Hague, 1982, at page 213.

⁵ Sir William Halane and R.J. Thomson, "Too Much Wheat: A Burden on the World Economy: Is Planned Economy Inevitable?" *The Times* 28 March 1933, cited in Kabir-ur-Rahman Khan, *The Law and Organization of International Commodity Agreements*, Martinus Nijhoff Publishers, The Hague, 1982, at page 211, footnote no. 2.

⁶ *Op. cit* footnote no. 1 at page 34.

⁷ *Ibid.* at page 34.

2. GATT 1947 and its development

The original proposal for a global trading system was contained in the ill-fated Havana Charter. The Charter was substantially "based on" the proposals and the main obligations of the "U.S. pre-War bilateral agreements".⁸ The Charter was originally in five parts, one dealing with goods, "a section concerning Employment and Economic Activity", a part dealing with "economic development and reconstruction", one dealing with "restrictive business practices, and "a section addressing inter-governmental commodity agreements".⁹ The last part dealt with the "establishment and operation of" the proposed International Trade Organisation (ITO), and the proposed mechanism for the settlement of trade disputes at a global level.¹⁰ Only the first part, which dealt with goods, entered into force, becoming the General Agreement on Tariffs and Trade 1947.

A further attempt was made in 1958 with the agreement of documentation in order to set up the Organisation for Trade Co-operation (OTC), which, as with the earlier ITO proposal, never obtained US Congress ratification.¹¹ The formation of an institutional framework for world trade had to wait until the conclusion of the Uruguay Round of GATT negotiations, which led to the establishment of the World Trade Organisation in 1994.¹² In the meantime the Interim Commission for the ITO, which operated as a body of the United Nations, administered GATT 1947, receiving funding from the US via their general contribution to the UN budget.¹³ Despite originating from a lack of institutional

⁸ Thomas & Meyer, *The New Rules of Global Trade, A Guide to the World Trade Organization*, Carswell, Thomson Professional Publishing, 1997, at page 3.

⁹ *Ibid.* at page 4, footnote no. 1.

¹⁰ *Ibid.* at page 4, footnote no. 1.

¹¹ *Op. cit.* footnote no. 1 at page 78 et seq.

¹² Pursuant to the Marrakesh Agreement Establishing the World Trade Organization.

¹³ *Op. cit.* footnote no. 1 at page 80.

structure the "GATT evolved over time, to have many of the attributes of an international organization".¹⁴

The GATT developed from its original inception by way of a series of rounds of negotiations,¹⁵ leading up to the Uruguay Round and the founding of the WTO. The initial rounds focused on "achieving tariff reductions"¹⁶ with subsequent rounds dealing with the accession of new contracting parties to GATT 1947. The Dillon Round (1960-61) had to grapple with the challenges to the global trading system of the founding of the EEC, and its "common external tariff".¹⁷ By the time of the Kennedy and Tokyo rounds more substantive outcomes were being achieved in the GATT negotiations, with the issue of less developed countries beginning to come to the fore with the insertion of a new Part IV: Trade and Development, to GATT 1947, which came into practice in 1965, and legally into force in 1966.¹⁸

2.1 Kennedy Round

The Kennedy Round was the first round at which developing countries played an important role at the negotiations, pursuant to the aforementioned new Part IV to GATT 1947. Negotiations no longer followed the traditional item-by-item basis, but now followed a linear basis of negotiation, which helped to speed up the process of the negotiations. Sectoral negotiations opened up in certain commodity areas, which, while not substantively successful at the Kennedy round stage, set a precedent which was to be followed in later rounds.¹⁹ In addition, non-

¹⁴ Op. cit. footnote no. 8, at page 29.

¹⁵ 1946 - Geneva, Switzerland (in parallel with negotiation of the Agreement); 1949 - Annecy, France; 1950-51 - Torquay, England; 1955-56 - Geneva, Switzerland; 1960-61 - the "Dillon Round" in Geneva, Switzerland; 1964-67 - the "Kennedy Round" in Geneva, Switzerland; and 1973-79 - the "Tokyo Round" in Geneva, Switzerland, Thomas & Meyer; *The New Rules of Global Trade, A Guide to the World Trade Organization*, Carswell, Thomson Professional Publishing, 1997, at page 5 et seq.

¹⁶ Op. cit. footnote no. 8, at page 6.

¹⁷ Ibid. at page 6.

¹⁸ Op. cit. footnote no. 1, at page 242.

¹⁹ Op. cit. footnote no.8, at page 6.

tariff barrier issues were dealt with successfully for the first time during the Kennedy Round, leading to a new Anti-dumping Code.²⁰

2.2 Tokyo Round

By the time that the Tokyo Round of negotiations, (1973 -79), was launched in Japan, many tariffs had been "substantially reduced", and the issue of non-tariff barriers to trade had come to the fore. With the exception of the "Kennedy Round's Anti-dumping Code" it was with the Tokyo Round that GATT shifted from "its traditional focus of tariff barriers to trade in goods" to the issues of the new "Programme of Work" of "non-tariff and para-tariff barriers" to international trade.²¹ In addition GATT's existing "safeguard" mechanism and agriculture were also to be addressed in the Tokyo round.²²

Negotiations were delayed while the US delegates obtained a negotiating mandate from the US Congress, but once started, agricultural negotiations quickly came unstuck, and had to be abandoned in July 1977 in order to let the balance of the negotiations enter the final phase of negotiations.²³ Several new codes dealing with non-tariff barriers were agreed,²⁴ to include; a Subsidies code,²⁵ an Anti-dumping code,²⁶ a Customs Valuation code,²⁷ an Import Licensing code,²⁸ a Standards code,²⁹ and a Government Procurement Code.³⁰ Membership of these codes was optional to GATT contracting parties, with some of the codes being

²⁰ Agreement on Implementation of Article VI of the Agreement on Tariffs and Trade, GATT, BISD 15S/24.

²¹ Op. cit. footnote no. 8, at page 8.

²² Ibid. at page 9.

²³ Ibid. at page 9.

²⁴ Ibid. at page 9.

²⁵ Formally known as the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade. See BIS 26S/56.

²⁶ Formally known as the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade See BISD 26S/171.

²⁷ Formally known as the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade. See BISD 26S/116.

²⁸ Formally known as the Agreement on Import Licensing Procedures See BISD 26S/154.

²⁹ Formally known as the Agreement on Technical Barriers to Trade See BISD 26S/8.

³⁰ Formally known as the Agreement on Government Procurement. See BISD 26S/33.

successful, and others not. Contrary to expectations, the Tokyo Round failed to produce a "Safeguards code".³¹

Three sectoral agreements were also completed, namely the Agreement on trade in Civil Aircraft, the International Dairy Arrangement and the Arrangement Regarding Bovine Meat, with both the Meat and Dairy Agreements being mainly "consultative in nature".³² In addition an enabling clause³³ for developing countries was agreed,³⁴ in order to ensure that the developing block of countries did not leave the negotiations. Balance of payments provisions³⁵ were also agreed together with an understanding on dispute settlement procedures.³⁶

The Tokyo Round was seen to be of limited success, as while "substantial tariff negotiations had been negotiated"³⁷ and new codes agreed, long term problems remained outstanding at the conclusion of the round, particularly in the area of textiles, agriculture, safeguards and voluntary export restraints (VERs). In addition institutional matters remained outstanding.³⁸ The shift in emphasis from tariff barriers to non-tariff barriers, and from GATT 1947 to interpretative codes, "changed the character of GATT negotiations".³⁹ Negotiations continued to be bilateral, with agreements being subsequently multilateralized, using the MFN principle.⁴⁰ It is felt by some commentators that the shift to the use of the codes "weakened the principles of non-discrimination and reciprocity in dealings among

³¹ Op. cit. footnote no. 8, at page 12.

³² Ibid. at page 12.

³³ This clause permitted "special and differential treatment to developing countries notwithstanding GATT's MFN obligations of Articles I and II, and allows developing countries to enter into tariff reduction agreements amongst themselves without requiring strict compliance with GATT Article XXIV"; Op. cit. footnote no. 8, at page 10, footnote no. 18.

³⁴ Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, BISD 26S/203.

³⁵ Declaration on Trade measures Taken for Balance-of-Payments Purposes, BISD 26S/205.

³⁶ The Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance, BISD 26S/210.

³⁷ Op. cit. footnote no. 8, at page 12.

³⁸ Ibid. at page 12.

³⁹ Robertson, David; GATT Rules for Emergency Protection, Trade Policy Research Centre, 1992, at page 13.

⁴⁰ Ibid. at page 13.

contracting parties" under GATT.⁴¹ Use of Article XXIV, which permitted customs unions and free trade areas, had developed to a high level by the Tokyo Round, and it was felt by the advocates of globalisation over regionalisation that the MFN principle was being increasingly watered down.⁴² In addition, the Tokyo Round interpretative codes, unlike those of the subsequent Uruguay Round, were not universally applied. They were "designed to lie outside the General Agreement", and, in the absence of "a requirement that signatories have to apply their provisions to all GATT contracting parties" distorted the MFN concept.⁴³

2.3 Preparation for the Uruguay Round

Preparations for the Uruguay Round involved a substantial revision of the 1979 Work Programme, with the United States insisting, "in the face of extensive reluctance from many developing countries" that trade in counterfeit goods and trade in services be included.⁴⁴ Two groups formed in the run up to the Uruguay Round, the G9,⁴⁵ which supported the concept of a new round of talks, and the G10,⁴⁶ which did not. The G9 viewpoint prevailed. Issues of continuing concern in the run up to the Uruguay Round included "safeguards, dispute settlement, agriculture, textiles and clothing, tariff and non-tariff barriers".⁴⁷ The Leutwiler group, which produced a report, entitled "Trade Policies for a Better Future: Proposals for Action", in 1985, was instrumental in getting the new round of negotiations off the ground.⁴⁸ The Leutwiler Report played "a pivotal role in

⁴¹ Ibid. at page 14.

⁴² Ibid. at page 14.

⁴³ Ibid. at page 14.

⁴⁴ Op. cit. footnote no. 8, at page 13.

⁴⁵ Australia, Canada New Zealand and the EFTA countries of Austria, Finland, Iceland, Norway, Sweden and Switzerland.

⁴⁶ Argentina, Brazil, Cuba, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania and Yugoslavia.

⁴⁷ Op. cit. footnote no. 8, at page 13.

⁴⁸ The 15 recommendations of the Leutwiler Report were; "-trade in agricultural goods and textiles and clothing needed to be brought within basic GATT rules; -all voluntary export restraints should be eliminated and prohibited, and the rules concerning safeguards improved and followed; -rules concerning subsidies needed to be improved; -the existing Tokyo Round Codes needed to be improved; -disciplines concerning customs unions and free trade areas needed to be revised and improved; -new rules concerning trade in services should be explored; -rules concerning dispute settlement needed to be strengthened; -a new and

moving the process forward" and most of its recommendations "found their way onto the Uruguay Round's negotiating agenda".⁴⁹ The final Uruguay Round texts were eventually signed, after highly tortured negotiations, in Marrakech, Morocco, April 1994, and duly entered into force on the 1st January 1995, with countries committing themselves to re-launching trade negotiations by the year 2000.⁵⁰

3. History of Agriculture at GATT

The USA emerged from World War II with the Second War Powers Act of 1942 still in place. This piece of legislation operated quotas on imports of agricultural goods into the US, together with "domestic programmesfor certain fats, oils and rice, primarily as measures to aid in the distribution of products that were in short supply, or to assist in the orderly liquidation of temporary government-owned surpluses."⁵¹ Section 22⁵² of the Agricultural Adjustment Act of 1933 dealt with quantitative imports of commodities such as "cotton, wheat and wheat flour," which were receiving support within the US.⁵³ Support and protection for farming had become the norm in industrialised countries due to the "heavy fall in agricultural world market prices during the inter-war period".⁵⁴ This support typically ranged from the purchase by government agencies of surplus produce, compulsory restrictions on production,

permanent Ministerial-level body needed to be established; and -a new round of multilateral trade negotiations should be launched to address these outstanding issues". Op. cit. footnote no. 8, at page 14.

⁴⁹ Op. cit. footnote no. 8, at page 14.

⁵⁰ Article 20 of the GATT texts confirms that one year after the end of the implementation of the GATT 1995 negotiations are to restart on the next GATT/WTO agreement. The implementation period, as defined in Article 1(f) is the six year period commencing in the year 1995 except that, for the purposes of Article 13, it means the nine year period commencing in 1995.

⁵¹ Op. cit. footnote no. 1, at page 162.

⁵² For the text of section 22 of the U.S. Agricultural Adjustment Act of 1933, See Annex 3 to this thesis.

⁵³ Op. cit. footnote no. 1, at page 162.

⁵⁴ Ibid. at page 160.

together with "quantitative import regulations" and export subsidies.⁵⁵ In addition direct payments were made to farmers, to differing extents in different countries, in order to protect them from the "fall in world market prices".⁵⁶

The inter-War provisions, despite having been modified for the period during the second World War, were still in place during the negotiating period leading up to the agreement of GATT 1947 and the ill fated Havana Charter.⁵⁷ When it became clear that GATT 1947 was to be the only part of the agreed documents to come into operation, the Contracting Parties decided that when members signed the agreement, that they could "make a reservation for existing legislation", and that they should endeavour to ensure that national legislation was in "complete conformity" with the provisions of the agreement as soon as possible.⁵⁸ This provision for existing legislation became of special importance for agricultural products.⁵⁹ It had been intended that no differentiation would be made between agricultural and industrial products, however, as none of the negotiating countries was prepared to abandon their special support programmes for agriculture, which in many cases, had, since the War years, become "permanently integrated into the general economic and social policy of the welfare state",⁶⁰ it was accepted that a compromise had to be made, with Article XI GATT, on the elimination of quantitative restrictions, together with its agricultural exception at 2.c, being the result.

As referred to earlier in this chapter, multi-lateral global trade in Agricultural products had traditionally been regulated by commodity agreements.⁶¹ Commodity agreements usually were set up by commodity

⁵⁵ Ibid. at page 160.

⁵⁶ Ibid. at page 160.

⁵⁷ Ibid. at page 160.

⁵⁸ Ibid. at page 162 et seq.

⁵⁹ Ibid. at page 162 et seq.

⁶⁰ Ibid. at page 161.

⁶¹ UNCTAD's Integrated Programme for Commodities (IPC) covers; cocoa beans, coffee, sugar, tea, cotton and cotton yarn, hard fibres and products, jute and manufactures, natural rubber, copper and tin, bananas, beef, vegetable oils and oilseeds, timber (non-coniferous), bauxite, iron ore, manganese ore and phosphate rock.

producers with a view to maintaining prices of the goods supplied to the market. Only rarely were the commodity agreements the result of an agreement by both the suppliers and the consumers of the particular product concerned. At the London Monetary and Economic Conference of 1933, held under the aegis of the League of Nations,⁶² the desirability of commodity agreements, which by then had existed for some time, was questioned in anything other than the abnormal trading circumstances then prevalent in the western world. The onset of World War II made many commodity agreements inoperable; however, with the return of peace, commodity agreements were seen as a method of avoiding the "wide and wild price fluctuations" of the 1930's, and were seen as having a role as "quantitative control schemes aimed solely at increasing the price of the commodity in question".⁶³ It is for this reason that at the Annecy session⁶⁴ of the GATT negotiations it had been suggested that the provisions of the Havana Charter dealing with commodity agreements⁶⁵ be ratified in advance of the balance of the Charter. Again this proposal encountered problems with the US ratification process.⁶⁶

The GATT Contracting Parties did recognise that commodity agreements came within the competence of GATT, and annual reports "on developments in raw material markets" from the Chairman of the Interim Co-ordinating Committee for International Commodity Arrangements (ICCICA)⁶⁷ were submitted to GATT, however GATT did not take an active part in commodity agreements until the Kennedy Round of negotiations.⁶⁸

⁶² Which the US attended and actively participated in, particularly to advocate the setting up of a copper commodity agreement.

⁶³ Raffaeli Marcelo; "Rise and Demise of Commodity Agreements", Woodhead Publishing Limited. Cambridge, England, 1995, at page 3.

⁶⁴ In 1948.

⁶⁵ Chapter VI of the Havana Charter.

⁶⁶ Op. cit. footnote no. 1, at page 165.

⁶⁷ Set up by the UN's Economic and Social Council in 1947.

⁶⁸ Op. cit. footnote no. 1, at page 166.

Once GATT 1947 came into operation agricultural issues quickly came to the fore. The US delegates to GATT were regularly questioned and reprimanded on the state of the United States' domestic agricultural policy, while Western European countries continued as they always had done, operating the defence that they had balance-of-payments difficulties.⁶⁹ By the mid 1950's Western Europe's balance-of-payments situation had improved, and the domestic agricultural policies of these GATT member states came more clearly into focus, in particular West German agricultural policy.

The late 1950's brought a new factor to play in agricultural protectionism, the development of the Common Agricultural Policy of the EEC, with Dr. Mansholt representing the EEC at the thirteenth session of the GATT, which ran from October to November 1958. The Haberler report on Agriculture⁷⁰ was also presented to the GATT Contracting Parties at the thirteenth session. Professor Haberler had been asked to conduct an expert group investigation into "'past and current international trade trends and their implications',⁷¹ with special reference to certain factors, amongst them the widespread resort to agricultural protection".⁷²

Mansholt was quite critical of the Haberler report in his submission to the GATT session, taking the view that agricultural issues could not be addressed by "creating so-called free trade"⁷³ and that what was required was a "code of agricultural policy".⁷⁴ The thirteenth session set up a number of special committees to investigate ongoing problems,⁷⁵ amongst them Committee II which was to deal with Agricultural problems. This eventually fed into the Kennedy

⁶⁹ Ibid. at page 166 et seq.

⁷⁰ The Haberler Report: Trends in International Trade. A Report by a Panel of Experts. Geneva, October 1958.

⁷¹ BISD, Sixth Suppl. 1958, p. 18.

⁷² Op. cit. footnote no. 1, at page 171.

⁷³ Ibid. at page 170.

⁷⁴ Ibid. at page 170, quoting from Press Release GATT/402, October 25, 1958.

⁷⁵ Committee I deal with the issue of further reductions in tariffs, Committee II, non-tariff measures affecting and protecting agricultural production, and Committee III, the maintenance and expansion of the export-earnings of less-developed countries. Op. cit. footnote no. 1, at page 86.

Round of negotiations, (1964-67), as much of the next round of negotiations, the Dillon Round, (1960-61), was spent dealing with the repercussions of the newly created EEC, and its "Common External Tariff".

4. GATT 1947 and Agriculture; getting down to business

4.1 GATT Committee II

The issue of subsidies generally had arisen during the 1955 revision of GATT, the agreement being that there would be a "gradual elimination of subsidies on products other than primary products".⁷⁶ Most contracting parties however, held the view that their agricultural support programmes should continue in existence.⁷⁷ This reluctance to admit that domestic agricultural provisions were the subject matter of GATT remained a barrier to multi-lateral trade in agricultural commodities. As a consequence the GATT Committee II, which was set up in 1958, had a very wide remit. This included the "use of non-tariff measures", underlying domestic agricultural policies, the "adequateness" of GATT 1947 for the promotion of international trade in agricultural commodities, and a "study of procedures for consultations among member countries on agricultural problems as they affect trade",⁷⁸ with the main focus of the Committee being on agricultural protection of products produced in temperate zones.⁷⁹ Specific commodities given priority were "cereals, dairy products, meat, sugar, fish and vegetable oils".⁸⁰ The report of the Committee formed the basis for further negotiations, particularly the Kennedy Round. In addition, in 1961 the GATT Council was authorised to set up preparatory groups for particular commodities, two of which were set up, one for meat, and one cereals.⁸¹

⁷⁶ Op. cit. footnote no. 1, at page 157.

⁷⁷ Ibid. at page 158.

⁷⁸ Ibid. at page 171.

⁷⁹ Ibid. at page 172.

⁸⁰ Ibid. at page 172.

⁸¹ Ibid. at page 176.

4.2 US and EEC position

The United States sought, and obtained, in 1955 subject to conditions, an unlimited, (in scope and time), waiver from import fees and quota provisions of GATT 1947 for 21 commodity groups,⁸² to allow for its existing price-support provisions under section 22 of the Agricultural Adjustment Act 1933.⁸³ Contracting parties who objected to the US exemptions retained the right to retaliate, a provision which the Netherlands made extended use of in subsequent years.⁸⁴ The US War Powers Act 1942⁸⁵ expired in 1951, however the existing import restrictions were adopted by the Defence Production Act 1950,⁸⁶ section 104 of which giving the necessary powers to the Secretary of Agriculture to impose "import controls on agricultural products", to include the powers contained in the earlier War Powers Act. The provisions of section 104 were clearly contrary to the provisions of GATT 1947, however they remained in force until the 30th June 1953,⁸⁷ with section 22 of the Agricultural Adjustment Act continuing to operate to impose "restrictions of dairy products" and edible tree nuts after that date.⁸⁸ To add insult to injury, the US enacted the Trade Agreements Extension Act in 1951.⁸⁹ This provided that "no trade agreement or other international agreement entered into by the United States might be applied in a manner inconsistent with the requirements of section 22 of the Agricultural

⁸² Applied to only nine of those commodities from 1954/5.

⁸³ The Agricultural Adjustment Act of 1933 "provided the basic legislative framework for the New Deal agricultural relief programs" until its production control elements were deemed unconstitutional in the U.S. Supreme Court case *United States v. Butler*, 297, U.S. Reports 1 (1936). This case left the "federal government's power in the fields of marketing agreements and purchases for surplus removal" intact. Meyer, Pedersen, Thorson and Davidson, *Agricultural Law*, West Publishing, Minnesota, US 1985, at pages 21 and 24 respectively.

⁸⁴ Op. cit. footnote no. 1, at page 93.

⁸⁵ Which as referred to earlier in this chapter, operated quotas on the import of agricultural goods, and organised the price support of certain commodities.

⁸⁶ This act came into force on the 31st July 1951.

⁸⁷ Op. cit. footnote no. 1, at page 163.

⁸⁸ Ibid. at page 163.

⁸⁹ Which inter alia "prohibited granting MFN treatment to imports from countries controlled by the foreign government or foreign organization controlling the world Communist movement" Leah A. Haus: *Globalizing the GATT; The Soviet Union's Successor States, Eastern Europe, and the International Trading System*, The Brookings Institute, Washington D.C.1992.

Adjustment Act",⁹⁰ Congress thereby thumbing its nose at GATT 1947. Against the backdrop of this unhappy situation of US protectionism the Kennedy Round of negotiations opened in 1964.

For its part the EEC's Common Agricultural Policy (CAP) had come into operation in 1963, with the final decision on the nature of the CAP being taken in January 1966. The founding of the EEC in 1957 caused much upset amongst advocates of the multi-lateral trading system epitomised by GATT 1947,⁹¹ however GATT managed to adjust sufficiently under the Dillon Round to accommodate the EEC. The delay in the commencement of the CAP of the EEC had a major impact on the Kennedy Round,⁹² which was contemporaneous.⁹³

4.3 The Kennedy Round (1964 to 1967)

By the time of the Kennedy Round agricultural exports were the "most important single export" of the United States, which was very much in favour of liberalising global agricultural trade, as reflected in the provisions of the Trade Expansion Act of 1962. This act contradictorily retained in force section 22 of the Agricultural Adjustment Act, which required Congress approval for international agreements within its remit.⁹⁴

While the results of the Kennedy Round were limited, they were accepted by the US.⁹⁵ The most important commodities negotiated were cereals, meat and butter, with neither the meat nor butter negotiations being reflected in the final texts. The negotiations on wheat led to an agreement between the Contracting Parties to re-negotiate the International Wheat Agreement, the first entry by

⁹⁰ Op. cit. footnote no. 1, at page 162.

⁹¹ See in particular Royer, Jean, "World Trade: The Danger of regionalism", *Lloyds Bank Review*, No. 66, October 1962, quoted in *International Trade Policy and the GATT 1947-1967*, by Karin Kock, Almqvist & Wiksell, Stockholm, 1969, at page 132.

⁹² 1964-67.

⁹³ Op. cit. footnote no. 1, at page 127 et seq.

⁹⁴ Ibid. at page 176.

⁹⁵ Ibid. at page 182.

GATT into the realm of Commodity Agreements. The International Wheat Agreement was later dealt with at a "world-wide conference in the autumn of 1967".⁹⁶

Little progress was made on the area of Agricultural protectionism at the Kennedy Round, with the US still utilising its GATT waiver for four commodities at its conclusion, "sugar, wheat, peanuts and dairy products".⁹⁷ In addition, despite the advocacy of the U.S. of agricultural trade liberalisation during the GATT negotiations, immediately after the Kennedy round, the United States introduced protection measures for dairy products, which were globally a very sensitive product at the time. Matters therefore had not progressed much in the lead up to the Tokyo Round.

4.4 The Tokyo Round (1973-79)

While the Tokyo Round continued the process of tariff reduction, much of the emphasis of the Round was on the "rules of trade policy",⁹⁸ with the focus being more on technical standards, customs valuation procedures and import licensing. Also covered were "new interpretative codes on subsidies and countervailing duties and emergency protection under Article XIX"⁹⁹ together with changes to the Anti-dumping code. It was felt however that the specific problems of agriculture had not been addressed, despite the fact that an average reduction in customs duties of 33% was agreed to be implemented "over a seven-year period from 1 January 1980" for a "small number of agricultural

⁹⁶ Ibid. at page 182.

⁹⁷ Op. cit. footnote no. 8, at page 71, footnote no. 32.

⁹⁸ Op. cit. footnote no. 39, at page 13.

⁹⁹ Ibid. at page 13.

products".¹⁰⁰ Two specific agricultural commodities were, however, addressed, namely bovine meat¹⁰¹ and dairy products.¹⁰²

4.5 The lead up to the Uruguay Round

Two major factors brought Agriculture centre stage during the Uruguay Round of negotiations. The "Export Subsidy War" between the US and the EC, which broke out in 1986 formed the backdrop of the Uruguay Round negotiations. In addition, coinciding with the commencement of the Uruguay round of negotiations the OCED was also addressing the issue of international agricultural policies,¹⁰³ under what was termed the "Trade Mandate".¹⁰⁴ This examined the assistance granted to producers by various national governments under all their various guises. These aids were termed by the OECD as "Producer Subsidy Equivalents". The Mandate Report introduced the discussion of agricultural trade into a new era, opening up a true international discussion of national policies. The negotiations were not easy, and agriculture threatened to bring the whole round to breaking point. While the unofficial power house during the GATT negotiations, and in the early WTO, was the quad group,¹⁰⁵ the main protagonists at the Uruguay Round in the area of Agriculture were the United States, the European Community, and what became known as the Cairns Group.¹⁰⁶

In December 1991 the then GATT Director General, Arthur Dunkell drafted a proposed final act, (the so called Dunkell draft), which was adopted

¹⁰⁰ Delcros, Fabian; *The Legal Status of Agriculture in the World Trade Organization; State of Play at the Start of Negotiations*, Journal of World Trade 36(2), 219-253, 2002, at page 224, footnote no. 11.

¹⁰¹ Under the International Bovine Meat Agreement, which set up the International Meat Council. GATT Treaty Texts, Booklet 8 July 1995, and the Official Journal of the European Communities, OJ [1980] L 71/7.

¹⁰² The International Dairy Agreement, GATT Treaty Texts, Booklet 10(c), issued December 1995, which set up the International Dairy Products Council GATT Treaty Texts, Booklet 8 July 1995, and the Official Journal of the European Communities, OJ [1980] L 71/11.

¹⁰³ From 1982 to 1987.

¹⁰⁴ Which was supervised jointly by the Agriculture and Trade Committees.

¹⁰⁵ United States, European Union, Japan and Canada.

¹⁰⁶ 1. Argentina, 2. Australia, 3. Brazil, 4. Canada, 5. Chile, 6. Colombia, 7. Fiji, 8. Hungary, 9. Indonesia, 10. Malaysia, 11. New Zealand, 12. The Philippines, 13. Thailand, 14. Uruguay.

substantially modified at Blair House in November 1992. A subsequent French refusal required a revamping of the Blair House accord,¹⁰⁷ which later became the adopted text. The final agreement between these parties, to be applied to the GATT members as a whole covered four areas:

1. Internal Support;
2. Export Subsidies,
3. Market Access,
- and 4. Food Security (to encourage stockpiling instead of trade protection, to achieve food security objectives).

5. Nature of WTO Legal structure and how it operates

5.1 Introduction

GATT 1994 is the key document in Annex 1 A, which deals with goods, to which the tariff schedules of the Member States of the WTO are attached by virtue of the Marrakesh Protocol.¹⁰⁸ Tariff reductions for food and agricultural products are to be made according to the reductions negotiated pursuant to the Agreement on Agriculture.¹⁰⁹ GATT 1994, while it relies heavily on GATT 1947, is legally distinct from GATT 1947, as provided for in Article II:4 of the WTO agreement. Separate membership and ratification of GATT 1994 is therefore required.¹¹⁰ GATT 1994 is comprised of "a combination of most of the important elements of GATT 1947 "together with "many additional 'understandings'" which were agreed at the Uruguay Round of negotiations",¹¹¹ all of which are Annex IA documents. These are integrated into GATT 1994 by virtue of Article 1(a) GATT 1994.

¹⁰⁷ Schott, Jeffrey J. assisted by Buurman, Johanna W., *The Uruguay Round: an Assessment*, Institute for International Economics, Washington D.C., 1994, at page 45 et seq.

¹⁰⁸ Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994.

¹⁰⁹ Op. cit. footnote no. 8, at page 75 et seq.

¹¹⁰ Ibid. at page 36.

¹¹¹ Ibid. at page 52.

The Protocol of Provisional Application, which comprised part of GATT 1947, does not form part of GATT 1994. GATT 1947 had four main elements: Part I, which covered Articles I and II, dealt with Most Favoured Nation (MFN), obligations to cut tariffs, which were to be implemented without "grandfather rights". Grandfather rights were rights contained in the "1947 Protocol of Provisional Application (PPA),¹¹² to exempt from GATT rules legislation in a country which preceded the signing of the GATT by the country in question".¹¹³ Part II of GATT 1947, which covered Articles III -XXIII contained most of the detailed obligations (which were to be implemented with a PPA exception allowing grandfather rights). Part III of the agreement covered articles XXIV-XXXIV, and was primarily procedural, to be fully implemented without a grandfather rights exception. Part IV of GATT 1947, covering Articles XXXV-XXXVIII related to special status within the GATT of developing countries.

From a legal perspective, GATT 1947 never came into force in its own right, but operated only as a provisional agreement, on the basis of the Protocol of Provisional Application. This protocol was signed up to by the original GATT 1947 signatories on the basis that the terms of GATT 1947 would operate only "to the extent that it was not inconsistent with then-existing legislation".¹¹⁴ Any national legislation which was inconsistent with GATT 1947 was "grandfathered" under the Protocol for Provisional Application, for original signatories, and "grandfathered" for acceding members, in their protocols of accession. Grandfather rights exempted national legislation in breach of GATT 1947 from GATT provisions. Whether an issue had been grandfathered was the subject of a number of GATT disputes.¹¹⁵ These grandfather rights did not survive GATT

¹¹² The Protocol of Provisional Application (PPA) provided the long standing "provisional rules" by which GATT 1947 was to be administered in the absence of the International Trade Organisation, which did not come into being due to the failure to ratify the Havana Charter.

¹¹³ Evans, Phillip and Walsh, James; *The EUI guide to the new GATT*; The Economist Intelligence Unit, 1994.

¹¹⁴ *Op. cit.* footnote no. 8, at page 53, footnote no. 5.

¹¹⁵ *Ibid.* at page 53, footnote no. 5.

1994,¹¹⁶ with the sole exception of the Article 3 GATT 1994 exception for US cabotage regulation¹¹⁷ contained in the US Merchant Marine Act, 1920, known also as the Jones Act.¹¹⁸ The issue of language is dealt with in Article 2.c GATT 1994, which provides that the GATT texts are equally authentic in the English, French and Spanish languages.

The Multilateral Agreement on Trade in Goods, a very brief document found in Annex I A, provides that; "In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organisation (referred to in the agreements in Annex 1A as the "WTO Agreement"), the provisions of the other agreement shall prevail to the extent of the conflict". Such a situation could arise with regard to agricultural goods, when Article XI:2 (c.) GATT 1947 and the Agreement on Agriculture are compared. The Agreement on Agriculture would prevail such a circumstance.¹¹⁹

The Annex 1A agreements, along with those of the other annexes, are administered by the WTO institutional mechanism.¹²⁰ The WTO has as its objectives, as set out in Article III of the Agreement establishing the World Trade Organization, the facilitation of the "implementation, administration and operation," and the furtherance of the objectives of the WTO agreement and the Multilateral Trade Agreements. The WTO is also to provide a framework "for the implementation, administration and operation of the Plurilateral Trade Agreements", which are annexed to the WTO agreement in Annex 2. It also operates as a forum for negotiations, and it administers the Dispute Settlement

¹¹⁶ Although it could be argued that the GATS agreement has been extensively grandfathered. See chapter 8 for a discussion on the GATS, and its impact on the global trade in agricultural commodities.

¹¹⁷ Which continues to be subject to regular WTO reporting and review.

¹¹⁸ Article 27 of the Merchant Marine Act 1920 "generally restricts maritime cabotage within the US to vessels built, owned and registered in the U.S., and staffed by U.S. citizens"; Op. cit. footnote no. 8, at page 54.

¹¹⁹ Op. cit. footnote no. 8, at page 71.

¹²⁰ The institutions of the WTO are set out more fully in Table II, which was obtained from the WTO website, attached to the end this chapter.

Understanding (DSU), which is in Annex 2 of the WTO agreement, and the Trade Policy Review Mechanism (TPRM), which is in Annex 3 of the WTO agreement. In addition the WTO is required to co-operate, "as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies".¹²¹ This latter role of the WTO is reinforced by the Uruguay Round Ministerial Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking.¹²² Co-operative agreements have since been signed by the WTO with the IMF and the World Bank.¹²³

5.2 WTO Institutional Structure

The WTO has a "common institutional framework",¹²⁴ which comprises at its head, the Ministerial Conference, under which operates the General Council,¹²⁵ the General Council meeting as the Trade Policy Review Body, the General Council meeting as the Dispute Settlement Body,¹²⁶ and the Trade Negotiations Committee. The Ministerial Conference meets at least once every two years,¹²⁷ with both the Ministerial Conference and the General Council being empowered to adopt interpretations of both the WTO Agreement and the multilateral trade agreements. In the case of Annex I agreements this will be on the basis of a recommendation of the Council "overseeing the functioning of that Agreement".¹²⁸ Adoption must achieve three-fourths majority of the relevant body in order to succeed.¹²⁹

¹²¹ Article III:5 Agreement establishing the World Trade Organization.

¹²² Op. cit. footnote no. 8, at page 36 at footnote no. 20.

¹²³ Ibid, at page 36 at footnote no. 20.

¹²⁴ Article II:1 Agreement establishing the World Trade Organization.

¹²⁵ Under which operate a long list of institutions, amongst them the Council for Trade in Goods, to which the Committee on Agriculture and the Committee on Sanitary and Phytosanitary Measures are answerable.

¹²⁶ Under which operates the Dispute Panels and the Appellate Body of the WTO.

¹²⁷ Article IV Agreement establishing the World Trade Organisation.

¹²⁸ Article IX:2 Agreement establishing the World Trade Organisation.

¹²⁹ Article IX Agreement establishing the world Trade Organisation.

Decisions are taken at the WTO pursuant to Article IX of the Agreement establishing the World Trade Organization, which provides that the normal process for making decisions will be by way of consensus. If consensus cannot be reached, then a vote will be taken, with each member state having one vote, with either the EC or its member states voting, and then the EC having as many votes as it has members, if it is the EC which votes.¹³⁰ Decisions will then be taken on the basis of "a majority of the vote cast, unless otherwise provided in (the WTO) Agreement or in the relevant Multilateral Trade Agreement".¹³¹ If an issue arises under the Plurilateral Agreements then the matter is to be governed by the provisions of those agreements.¹³² If members request plurilateral agreements to be added to or deleted from Annex 4 then such a decision will require consensus.¹³³

5.3 TPRM

Annex 3 of the Agreement establishing the World Trade Organisation provides for the Trade Policy Review Mechanism ("TPRM"), first provisionally agreed to at the Montreal Mid-Term Review in 1988, and adopted at the Uruguay Round.¹³⁴ The timing of the review by the WTO's Trade Policy Review Body depends on the importance of the Member State in the world trade context.¹³⁵ The

¹³⁰ The Agreement establishing the World Trade Organization provides that majority voting, (a three-fourths majority) will operate in four circumstances: adoption of interpretations of the agreements by the Ministerial Conference and/or the General Council, under Article IX:2; the waiver of a member's obligations by the Ministerial Conference, under Article IX:3; the making of amendments to documents, depending on the document, in the absence of consensus, by unanimity of all Members, by a three-fourths majority or by way of a two thirds majority, Article X; and admission of new members by the Ministerial Conference, by a two-thirds majority, Article XII:2; and by way of a two thirds majority of the General Council, the adoption of the budget, Article VII:3.

¹³¹ Article IX:1 Agreement establishing the World Trade Organization.

¹³² *Op. cit.* footnote no. 8, at page 40.

¹³³ Pursuant to Article 10.9 of the Agreement establishing the World Trade Organisation.

¹³⁴ *Op. cit.* footnote no. 8, at page 43.

¹³⁵ Countries reviewed every two years include the US, the EC (and its member states), Japan and Canada. The next sixteen largest countries are reviewed every four years, with the balance reviewed every six years. Least developed countries can be given extensions on a case by case basis. Annex 3:c to the Agreement establishing the World Trade Organization.

purpose of this review is to ensure compliance with WTO regulation¹³⁶ and to develop "domestic transparency of government decision-making on trade policy matters".¹³⁷ The review is conducted on the basis of two documents, one provided by the Member State under review in accordance with Annex 3:D, and a "report, to be drawn up by the Secretariat on its own responsibility, based on the information available to it and that provided by the Member State concerned".¹³⁸ Upon completion of these reports a meeting is held by the Trade Policy Review Body, at which they are discussed, and the minutes of the meeting are then published by the WTO.¹³⁹ As stated by Annex 3:A, this procedure is not "intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures" which is reserved for the Dispute Settlement Mechanism set up under Annex 2. In addition to the review of individual member states, or groups of states operating a "common external policy",¹⁴⁰ the Trade Policy Review Body will itself review the Trade Policy Review Mechanism within five years of "the entry into force of the Agreement Establishing the WTO",¹⁴¹ and at intervals thereafter, with reports being presented to each Ministerial Conference.

5.4 Dispute Settlement

Under GATT 1947, dispute settlement provisions were limited to Articles XXII, consultation, and XXIII GATT, which provides for "nullification or impairment" causes of action, the usual cause of complaint between member states of the WTO. From these two articles the pre-WTO dispute settlement procedure was developed. The ill-fated Havana Charter had more detailed

¹³⁶ Annex 3:A.

¹³⁷ Annex 3:B.

¹³⁸ Annex 3:C (v)(b).

¹³⁹ Op. cit. footnote no. 8, at page 44.

¹⁴⁰ Annex 3:C (ii).

¹⁴¹ Annex 3:F.

provisions, including "the more substantive procedures, including the ability to refer interpretative issues to the International Court of Justice".¹⁴²

Dispute Settlement at the WTO is pursuant to the Dispute Settlement Understanding, which is found in Annex II of the Agreement Establishing the World Trade Organisation. This sets up the Dispute Settlement Body, ("DSB")¹⁴³ which is "authorized to establish dispute settlement panels, adopt reports, oversee the implementation of rulings and recommendations, and authorize suspension of concessions and other obligations"¹⁴⁴ of the WTO multilateral agreements. It also covers disputes between the signatories of the plurilateral agreements over matters pertaining to those plurilateral agreements. Article 3 DSU, following the model of the Tokyo Round Understanding, sets out the basic framework of the DSU, with further details being filled in by Articles 4 to 16 DSU. The process utilised the inter-related procedures of "consultations, good offices, conciliation, mediation, arbitration, panel review, and appellate review of panel determinations".¹⁴⁵ Article XXIII GATT, as elaborated upon by the DSU, provides for two main causes of action before the DSU. These are violation of GATT/WTO obligations, and non-violation nullification and impairment actions. Section 26 DSU provides that non-violation nullification and impairment actions can be taken where "there is no specific violation of a WTO obligation", but that a member state has "adopted a measure which, although technically consistent with its WTO obligations" has the effect of "nullifying the benefits" of another member state.¹⁴⁶ Some of the WTO agreements permit non-violation nullification and impairment actions. The burden of proof is on the pursuing party in a non-violation action, unlike the violation claim, where it is with the defending member state. The remedy in a non-violation case is a recommendation by a panel or an appellate body of a "mutually

¹⁴² Op. cit. footnote no. 8, at page 308.

¹⁴³ Article 2 DSU.

¹⁴⁴ Op. cit. footnote no. 8, at page 314.

¹⁴⁵ Ibid. at page 315.

¹⁴⁶ Ibid. at page 326.

satisfactory compensation", while with a violation claim, the remedy is a requirement by the member state to "withdraw the measure at issue".¹⁴⁷

With regard to agricultural commodities the Agreement on Agriculture provides at Article 19¹⁴⁸ that the usual provisions of the WTO dispute settlement mechanism shall apply to disputes concerning Agricultural commodities. The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) has an additional provision at Article 11 SPS. It provides that in addition to the usual rules that if the dispute concerns a scientific or technical issue then the panel "should seek advice from experts chosen by the panel in consultation with the parties to the dispute". In addition it is possible for a panel to "establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative".¹⁴⁹ The panel and appellate panel findings will be examined from an agricultural context in Chapter 5.

Article 19 DSU provides that the panel or the Appellate Body can only "recommend that the Member concerned bring the measure into conformity with the relevant obligation".¹⁵⁰ A decision can then be taken by the Dispute Settlement Body under Article 20 DSU, with surveillance of the implementation of recommendations and rulings being conducted by the DSB under Article 21 DSU. Article 22 DSU provides for the possibility for "compensation and suspension of concessions" to be applied by the DSB in the event that "the recommendations and rulings are not implemented within a reasonable period of time". This can lead to cross-sectoral retaliation, which it is felt is "likely to

¹⁴⁷ Ibid. at page 326.

¹⁴⁸ Article 19 provides "The provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, shall apply to consultations and the settlement of disputes under this Agreement".

¹⁴⁹ Article 11.2 Agreement on the Application of Sanitary and Phytosanitary Measures.

¹⁵⁰ Op. cit. footnote no. 8, at page 323.

greatly increase the deterrent effect of the retaliation option, thus improving overall compliance with recommendations and rulings".¹⁵¹

6. The Agreement on Agriculture and the SPS agreements

The Agreement on Agriculture¹⁵² covers all agricultural products found in Chapters 1 through 24¹⁵³ of the Harmonised Commodity Description and Coding System (HS).¹⁵⁴ The HS came into force in January 1987, and was officially adopted by GATT¹⁵⁵ in 1992.¹⁵⁶ Fish and fish products are not covered by this agreement. Article 21 of the Agreement provides, unlike other WTO agreements, that it, the Agreement on Agriculture, will take priority over the provisions of the other Annex 1A agreements,¹⁵⁷ and that the Agreement on Dispute Settlement "shall apply subject to the provisions " of the Agreement on Agriculture.¹⁵⁸ The Agreement is administered by the Committee on Agriculture under Article 17 of the Agreement.¹⁵⁹ The Agreement on Agriculture was phased into force over a six year period commencing in 1995. During this period of time the Member States of the WTO began to implement the commitments specified in the schedules attached to the Agreement in Agriculture. These commitments are not considered profound, but rather the starting point for further negotiations as specified in Article 20, such further negotiations having resumed in 2000.

¹⁵¹ Ibid. at page 325.

¹⁵² Under Article 2 and Annex 1 of the Agreement on Agriculture.

¹⁵³ Together with a further 13 classifications under the HS system. See further Annex 1:1 of the Agreement on Agriculture.

¹⁵⁴ which was negotiated under the then Customs Co-ordinating Council, now referred to as the World Customs Council The HS was discussed in greater detail in chapter 3.

¹⁵⁵ Geneva Protocol to the General Agreement on Tariffs and Trade, BISD 39S/3.

¹⁵⁶ Op. cit. footnote no. 8, at page 75, at footnote no. 37.

¹⁵⁷ In effect all of the other agreements except the TRIPs, and GATS. Of an examination of how TRIPs and GATS interacts with the global trade in agricultural commodities see further chapter 8.

¹⁵⁸ Op. cit. footnote no. 100, at page 259.

¹⁵⁹ Article 17 Agreement on Agriculture; "A Committee on Agriculture is hereby established".

6.1 Market Access

Market access provisions are set out in Article 4 of the Agreement on Agriculture, and are elaborated on in the schedules of each member state which are annexed thereto. One of the major changes to international trade in agricultural products made by the Agreement is the requirement for tariffication of non-tariff measures restricting market access, thereby making them more transparent. The method of calculation of the tariffication of non-tariff measures was conducted in accordance with the formula set out in the "Agreement on Modalities for the Establishment of Specific Binding Commitments under the Reform Process, which is (contained in Annex 3 to) Part B of the Draft Final Act's Text on Agriculture".¹⁶⁰ Any pre-existing market access could not be adversely affected by the tariffication exercise.

In addition to the above, Member States were required to provide "a certain minimum degree of market access", of "at least three percent of domestic consumption, increasing to five percent over the implementation period".¹⁶¹ Subject to specific exemptions, there could be no new or increased tariffs imposed on agricultural products pursuant to Article 4.2 of the agreement. The duly tariffied non-tariff commitments, after having been subject to subsequent multilateral negotiations during the final stages of the Uruguay round, were then set out in the Member States commitments in their schedules annexed to the Agreement on Agriculture, thereby producing the "tariff-rate quota".¹⁶²

WTO member states are required to reduce their total tariffs by "an overall simple average of 36 percent over the six years of the implementation period",¹⁶³ with a minimum reduction for "each tariff line of 15 percent". The equivalent

¹⁶⁰ Op. cit. footnote no. 8, at page 77, at footnote no. 43.

¹⁶¹ Ibid. at page 77.

¹⁶² Ibid. at page 77.

¹⁶³ Ibid. at page 77.

commitment for developing countries was a reduction on average of twenty four percent, with each tariff line being reduced by a minimum of ten percent over the six years implementation period of the Agreement on Agriculture.¹⁶⁴ Certain exemptions are given for both developed and developing countries under Annex 5 to the agreement.

6.2 Special Safeguard Provisions

Recognising that the changes to agricultural regimes by the Agreement on Agriculture could result in surges in trade in individual agricultural commodities, Article 5 of the Agreement provides for Special Safeguard Provisions (SSP) for those commodities affected. The SSP comes in two forms, one based on volume of goods, and the other on price. Only one of these safeguards can be applied at any one time, and neither of the SSPs can be used in conjunction with a safeguard action under Article XIX of GATT.¹⁶⁵ The volume based safeguard can only last until "the end of the year in which it has been imposed",¹⁶⁶ and can only be triggered if the conditions set out in Article 5.4 are met. These depend on the market access of the product in question. If the product is only gaining less than or equal to ten per cent of market access, then the "base trigger level shall equal 125 percent". If the product is gaining access of greater than ten percent, and less than or equal to thirty percent, then the "base trigger level shall equal 110 per cent". If the market access of the product is greater than thirty per cent, then the "base trigger levels shall equal 105 per cent". Paragraph 4 of Article 5 goes on to elaborate how the actual quantity of additional duty is to be calculated.

The second SSP measure is one based on price, as is set out in Article 5.1.b. The exercise of this special safeguard provision is to be "determined on the basis of the c.i.f. import price of the shipment concerned expressed in terms of its domestic currency", should that price fall "below a trigger price equal to the

¹⁶⁴ Ibid. at page 77, at footnote no. 42.

¹⁶⁵ Ibid. at page 78.

¹⁶⁶ Article 5.4 Agreement on Agriculture.

average 1986 to 1988 reference price for the product concerned".¹⁶⁷ The actual quantity of the additional duty to be imposed in these circumstances is to be calculated in accordance with Article 5.5 of the Agreement.¹⁶⁸

The SSP approach of the implementation of additional duties, as opposed to the utilisation of quantitative restrictions, adds to the transparency of the measures and is in line with the suggestions of the 1985 Leutwiler Report.¹⁶⁹ The SSPs of the Agreement on Agriculture differ considerably from the provisions of the Agreement on Safeguards, which is also a document in Annex 1A of the Agreement Establishing the World Trade Organization. Unlike the Agreement on Safeguards provisions, and the other sectoral specific safeguard, that of Article 6 of the Agreement on Textiles and Clothing, the SSP does not require "an importing member to prove serious injury or causation"¹⁷⁰ in order to be activated, but merely the volume of goods or price triggers outlined above. In addition because of the short period of time in which the SSP is to operate, "until the end of the year in which it has been imposed",¹⁷¹ there is no provision for provisional measures or mid-term reviews as are provided for the ordinary safeguard provisions in the Agreement on Safeguards.¹⁷²

¹⁶⁷ Article 5.1.b. The reference price is further elaborated on in a footnote. This provides that; "The reference price used to invoke the provisions of this subparagraph shall, in general, be the average c.i.f. unit value of the product concerned, or otherwise shall be an appropriate price in terms of the quality of the product and its stage of processing. It shall, following its initial use, be publicly specified and available to the extent necessary to allow other Members to access the additional duty that may be levied".

¹⁶⁸ 1. c.i.f. import price "expressed in terms of the domestic currency" - trigger price $\leq 10\%$ \Rightarrow no additional duty is to be imposed (a.)

2. c.i.f. import price "expressed in terms of the domestic currency" - trigger price $10\% \leq 40\%$ \Rightarrow additional duty = 30% of the amount by which the difference exceeds 10% (b.)

3. c.i.f. import price "expressed in terms of the domestic currency" - trigger price $40\% \leq 60\%$ \Rightarrow additional duty = 50% of the amount by which the difference exceeds 40% + (2.).

4. c.i.f. import price "expressed in terms of the domestic currency" - trigger price $60\% \leq 75\%$ \Rightarrow additional duty = 70% of the amount by which the difference exceeds 60%, + (2.) + (3.).

5. c.i.f. import price "expressed in terms of the domestic currency" - trigger price $> 75\%$ \Rightarrow additional duty = 90% of the amount by which the difference exceeds 75%, + (2.) + (3.) + (4.).

¹⁶⁹ Mah, Jai S.; Reflections on the Special Safeguard Provision in the Agreement on Agriculture of the WTO Journal of World Trade 33 (5): 197-204, 1999, at page 198.

¹⁷⁰ Ibid. at page 199.

¹⁷¹ Article 5.4 Agreement on Agriculture.

¹⁷² Op. cit. footnote no. 169, at page 200.

6.3 Domestic Support Measures

Another major change to the global trade in agricultural products was effected by the commitments in Articles 3, 6 and 7 of the Agreement on Agriculture with regard to domestic support measures. This was done by way of calculation¹⁷³ of Aggregate Measures of Support (AMS),¹⁷⁴ together with commitments to their reduction.¹⁷⁵ Full details as to how each member calculated their AMS as set out in its schedule to the agreement "are to be found in the Draft Final Act's Text on Agriculture, Part B", which comprises the Agreement on Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme) at paragraphs 8, 9 and 10, and in Annexes 5 and 6 to Part B.¹⁷⁶

The AMS adopted by the Agreement on Agriculture were based on the OECD measurement of Producer Subsidy Equivalent. AMS are defined at Article 1(h) "as the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non product specific aggregate measurements of support and all equivalent measurements of support for agricultural products." Article 6.4 (de minimis provisions), Article 6.5 (production limiting provisions) and Annex 2 ("green box" provisions) to the Agreement on Agriculture all provide exemptions to the AMS calculation on condition that they meet two criteria. The payments must be "government, rather than consumer financed, and they cannot be in the form of a price support to producers".¹⁷⁷ Member States are not permitted to add to those measures in existence at the date of the conclusion of the Agreement on Agriculture,¹⁷⁸ and there can equally be no increase in any

¹⁷³ Pursuant to Annex 3 of the Agreement on Agriculture for Aggregate Measures of Support, and Annex 4 for Equivalent Measures of Support.

¹⁷⁴ Aggregate Measures of Support are defined in Article 1 of the Agreement on Agriculture.

¹⁷⁵ As per Article 3 and 6 of the Agreement on Agriculture, and part IV of each member's schedule attached thereto.

¹⁷⁶ Op. cit. footnote no. 8, at page 80, footnote no. 49.

¹⁷⁷ Ibid. at page 81.

¹⁷⁸ Article 3.3 Agreement on Agriculture.

particular support measure since that date.¹⁷⁹ Aggregate Measures of Support are subject to reduction commitments pursuant to "the domestic support reduction commitments of each Member contained in Part IV of its Schedule".¹⁸⁰

The Annex 2 exemptions are colloquially referred to as "green box" provisions, on the basis that they tend to be environmental in nature, and are non-, or minimally-, trade distorting. The key point about green box payments is that they "involve a decoupling of the financial or other support being provided to the producer from commodity prices or production levels".¹⁸¹ Further exemptions are available under Annex 5 where Member States agree not to "maintain, resort to, or revert to any measures of the kind which have even required to be converted into ordinary customs duties" in respect of primary agricultural products, subject to special safeguard provisions, provided for in Article 5 and Annex 5 of the agreement. This has resulted in a refocusing of national and EC payments to farmers towards income supplements, and away from direct production subsidies.¹⁸² This trend can be further evidenced by the EC's CAP mid-term review provisions, which are analysed in chapter 8.

Provisions qualifying for "green box" status, being fully decoupled payments, were treated in a privileged manner. Article 13 of the Agreement on Agriculture, known as the Peace Clause, provided that provisions of domestic support that conformed fully to the provisions set out in Annex 2 to the Treaty, are to be exempt from various provisions. They were not to be actionable for the purposes of countervailing duties, and were also to be exempt from actions based on Article XVI of GATT 1994, Part III of the Subsidies Agreement, and further, (amongst other exemptions), are to be exempt from "actions based on non violation, nullification, or impairment of the benefits of tariff concessions accruing to another Member under Article II of GATT 1994, in the sense of

¹⁷⁹ Article 7 Agreement on Agriculture.

¹⁸⁰ Article 6.1 Agreement on Agriculture.

¹⁸¹ Op. cit. footnote no. 8, at page 81.

¹⁸² Op. cit. footnote no. 107, at page 49.

paragraph 1(b) of Article XXIII of GATT 1994".¹⁸³ This was an important added protection for green box measures, and is also aimed at reducing the workload of the WTO's Dispute Settlement Mechanism. The Peace Clause has however, since expired, with a discussion as to possible consequences of same being made in chapter 7.

6.4 Export Subsidy Commitments

Export Subsidy Commitments were also made subject to reduction commitments in the Agreement on Agriculture. An export subsidy is defined in Article 1 of the Agreement on Agriculture as "subsidies contingent upon export performance, including the export subsidies listed in Article 9 of this Agreement". The Article 9 list includes "programmes such as direct export subsidies, internal transport subsidies granted to export shipments, marketing subsidies, below market price disposal programmes, and producer-financed export subsidies".¹⁸⁴ Article 8 restricts the use of export subsidies, as does Article 3.3 of the Agreement. These provisions are reinforced by the provisions of Article 10, which deals with prevention of circumvention of export subsidy commitments, and Article 11, which deals with incorporated products.

Article 10 also includes that an undertaking by Member States to "work toward the development of internationally agreed disciplines to govern the provision of export credits, export credit guarantee or insurance programmes, and, after agreement on such disciplines, to provide export credits, export credit guarantees or insurance programmes only in conformity therewith". This will limit the possibility of these tools being used as a form of export subsidy. The issue of food aid is also addressed in paragraph 4. Member States undertake only to provide food aid "in accordance with certain agreed to principles, and to endure

¹⁸³ For more details as to the exemptions granted to qualifying provisions see Article 23 of GATT 1994.

¹⁸⁴ Op. cit. footnote 8, at page 81.

that such aid is not, directly or indirectly, tied to commercial exports of agricultural products." ¹⁸⁵

WTO member state export subsidy reduction commitments are found in the draft final act. These commitments require members to "reduce export subsidies by 36 percent in monetary and budgetary terms, and by 21 percent in volume terms". ¹⁸⁶ The base level for these calculations is normally that which "existed during the 1986 to 1990 period". ¹⁸⁷ Individual Member States' commitments are laid out in each Member's Schedule, as per Article 9(2)(a) of the Agreement, which "sets out the maximum budgetary and volume amounts for every produce group for each year of the implementation period". ¹⁸⁸ These limits are annual limits for export subsidies that a Member can grant. If a product was not subsidised at the date of the Agreement, the Agreement also prevents the granting of any new export subsidy on any product. ¹⁸⁹ Article 13 (c.) of the Agreement on Agriculture, known as the "peace clause," provides that if a subsidy fully conforms with the provisions of Part V of that Agreement then it is to be protected from the provisions of the Agreement on Subsidies and Countervailing Measures. ¹⁹⁰ As noted, however, Article 13(c) expired on the 31st December 2003, ¹⁹¹ bringing the Agreement on Subsidies and Countervailing measures into the WTO legislative framework in the context of agricultural commodities. ¹⁹²

¹⁸⁵ Ibid. at page 83.

¹⁸⁶ Ibid. at page 82.

¹⁸⁷ Ibid. at page 82.

¹⁸⁸ Ibid. at page 82.

¹⁸⁹ Ibid. at page 82.

¹⁹⁰ Op. cit. footnote no. 100, at page 249.

¹⁹¹ Of which more in chapter 7.

¹⁹² See further chapter 7.

6.5 The SPS Agreement

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement),¹⁹³ also found in Annex 1A to the Agreement Establishing the World Trade Organisation, is referred to in Article 14 of the Agreement on Agriculture.¹⁹⁴ This is an important agreement in the area of agricultural trade, ensuring that the application to national sanitary and phytosanitary measures, a traditional tool in international trade, can continue, in order to "protect human, animal or plant life or health", but cannot be employed as unjustifiable non-tariff barriers, protecting domestic production from import competition.¹⁹⁵ SPS measures must not, however, be used unnecessarily or excessively for protectionist measures. The SPS Agreement does not specify SPS measures themselves, relying rather on standards set out by the international scientific bodies of the Codex Alimentarius Commission,¹⁹⁶ the International Office of Epizootics,¹⁹⁷ and the various bodies operating within the International Plant Protection Convention.¹⁹⁸ The SPS Agreement does however provide "general disciplines that apply to the development and application of all SPSMs",¹⁹⁹ with an SPS measure being defined in its Annex A. The provisions of the SPS Agreement may not, however, be interpreted as impairing the rights that members may have under such other international agreements in the area, including the right to invoke the dispute settlement provisions of other agreements or international organizations.²⁰⁰ The SPS agreement also provides at paragraph 4 of Article 1 that the terms of the Agreement on Technical Barriers to Trade (TBT

¹⁹³ Initially introduced in this thesis in chapter 3, and analysed further in chapter 8.

¹⁹⁴ Article 14 Agreement on Agriculture; "Members agree to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures."

¹⁹⁵ Op. cit. footnote no. 8, at page 88.

¹⁹⁶ http://www.codexalimentarius.net/web/index_en.jsp (founded in 1963 by the Food and Agriculture Organisation and the World Health Organisation, both UN bodies).

¹⁹⁷ Also known as the World Organisation for Animal Health,

http://www.oie.int/eng/en_index.htm.

¹⁹⁸ <https://www.ippc.int/IPPC/En/default.jsp>, which is governed by the Interim Commission on Phytosanitary Measures.

¹⁹⁹ Op. cit. footnote no. 8, at page 88 et seq.

²⁰⁰ Ibid. at page 94.

Agreement)²⁰¹ continue to apply to matters which are not within the definition of SPS measures. This is echoed by Article 5 of the TBT Agreement, which provides that the "provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures". The TBT Agreement operates to "extend and clarify the Agreement on Technical Barriers to Trade reached in the Tokyo round".²⁰² It regulates the certification procedures of the Contracting States, with the aim being that they do not become barriers to trade. The agreement has attached a "Code of Good Practice for the Preparation, Adoption and Application of Standards by standardising bodies" which is intended to be adopted by both governments and private organisations.

7. Conclusion

The historical and political climate which preceded not only the WTO Agreement on Agriculture, but also GATT 1947 has led to the current legal and political situation with agricultural production. Agriculture is still high on the political agenda at both the EC and the WTO level of governance. The impact of the provisions of the WTO Agreement on Agriculture, together with its interaction with its supporting agreements are continuing to impact on the EC CAP. How exactly the WTO agreements have been interpreted needs to be examined however, in order to obtain an accurate understanding of their legal effect. This will be examined in the next chapter, chapter 5, with the impact of WTO law on EC law being examined in chapter 6. Chapter 7 and the following chapters will then go on to analyse the impact of the synergy of the two legal systems and their respective "case laws".

²⁰¹ Discussed further to the extent that it affects the global trade in agricultural commodities, in chapter 8.

²⁰² WTO website <http://www.wto.org>.

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1. Introduction

While comparisons and contrasts will be made in chapter 7 between the legal structure and operation of the EC and the WTO, and its precursor, the GATT, in the area of agriculture, it is important to note that the role of law at these two levels of governance differs. While both the EC and the WTO have been given legal capacity,¹ by their legal documents, the governance of the EC is based on the rule of law; the role of law at the WTO/GATT level is more problematic. As stated by Ladefoged Mortensen, WTO research had to deal with the "interaction between 'the politics of judicialisation', and 'the legalisation of trade politics', with the constant interaction between the "WTO legal system and the WTO bargaining processes".² This is reflected in Article 11 DSU. This bargaining process within the WTO legal system is also reflected by the fact that the WTO legal texts provide for almost all internationally recognised political³ and legal⁴ methods of dispute settlement in the Dispute Settlement Understanding.

The variety of ways that the DSU can be utilised is not, however, always reflected in practice, as Petersmann observes that "good offices, conciliation and mediation are, however, hardly ever resorted to in GATT and WTO practice".⁵ This perhaps is unfortunate as private commercial entities, both at a national and international level are increasingly making recourse to Alternative Dispute

¹ Article 281 EC (ex. Article 210 EC) and Article VIII of the Agreement Establishing the World Trade Organisation.

² Mortensen, Jens Ladefoged; *The Institutional Requirements of the WTO in an Era of Globalisation: Imperfections in the Global Economic Polity*, E.L.J. 2000, 6(2), 176-204, at page 193.

³ Consultations/negotiations, good offices, mediation, inquiry, conciliation, Petersmann, Ernst – Ulrich; *Alternative Dispute Resolution - Lessons for the WTO*, Ch. 2 in Weiss, Friedl (ed.) *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the practice of Other International Courts & Tribunals* (Cameron May, London, 2000), at page 29.

⁴ International Adjudication, public international arbitrator, mixed international arbitration, private International Arbitrators, Judicial settlement by domestic courts. *Ibid.* at page 27 et seq.

⁵ *Ibid.* at page 33.

Resolution.⁶ However, it has been noted that ADR operates best when the parties have a balanced bargaining power, which is not always the case in WTO Dispute Resolution. Recourse to a court-like procedure better protects parties who would have a weaker bargaining position.⁷ The consultation provisions are "limited to GATT (or GATS) Article XXII situations, and subject to the consensus of the member to which the request for consultations is addressed".⁸ Arbitration is currently only provided for by the DSU in two instances, in order to "determine the reasonable period of time in which to comply with the recommendations and rulings of the DSB under Article 21.3 DSU", and "to determine the level of suspension of concessions (retaliatory measures) under Article 22.6 - 22.7 DSU".⁹ Recourse to the currently permitted alternative methods of using the DSU may however develop in future, and this should be borne in mind when considering the possible future development of the WTO.

In addition, it should be noted that the respective positions of the WTO Secretariat and the European Commission differ considerably within their respective legal systems, thereby affecting the development and enforcement of law differently within the two structures. The WTO Secretariat occupies a "much-criticised role....in the drafting of WTO Panel reports",¹⁰ while the EC Commission has been expressly given the role of "guardian of the Treaty", with the power, not only to bring infringement proceedings against recalcitrant Member States,¹¹ but also to "initiate pre-litigation"¹² dispute resolution

⁶ Ibid. at page 28.

⁷ Ibid. at page 29.

⁸ Rosas, Allan; Joinder of Parties and Third Party Intervention in WTO Dispute Settlement, Ch. 6 in Weiss, Friedl, (ed.) *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the practice of Other International Courts & Tribunals*, Cameron May, London, 2000, at page 83.

⁹ Ibid. at page 85.

¹⁰ Usher, J.A.; Joinder of Actions, Submission of Observations in References for Preliminary Rulings, and Intervention by Member States, Community Institutions, and any Other Person in ECJ Proceedings, Ch. 7 in Weiss, Friedl (ed.) *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the practice of Other International Courts & Tribunals* (Cameron May, London, 2000), at page 89.

¹¹ Pursuant to Article 226 EC (ex. Article 169 EC).

¹² Pursuant to both Article 226 (ex. Article 169 EC) and Article 227 EC (ex. Article 170 EC).

procedures.¹³ As stated by Usher, "this overt policing role is very different from that of the WTO Secretariat".¹⁴

Both the European Court of Justice of the EC, and the Dispute Resolution System of the WTO are "courts of attribution" in the sense that they are restricted by the powers granted to them by their legal documents, and their "room for manoeuvre is limited".¹⁵ As Hudec points out, governments, the controlling entities of both the EC and the WTO, are "collective entities", not possessing a "single mind and a single thought process".¹⁶ The impact of the political thought processes of member state governments differs in its influence on the application and interpretation of law once written at the EC and WTO level. At the EC level, the ECJ case law has been referred to by the late Judge Mancini as coinciding with the "making of a constitution for Europe",¹⁷ with the Treaty of Rome underlying "the separation of powers between the executive, the legislature and the judiciary".¹⁸ This separation of powers is not so evident at the WTO, with national politics, or the "autonomous linked games" of the CAP and the WTO, of Coleman and Tangermann,¹⁹ continuing to influence the development and enforcement of WTO case law.

In addition to the above problems, while the WTO operates to regulate part of the globalisation process, "only certain aspects" of the globalised "economic political space have been brought under interstate control, and

¹³ Op. cit. footnote no. 3, at page 33.

¹⁴ Op. cit. footnote no. 10, at page 89.

¹⁵ The Hon. Lord Mackenzie Stuart; "Problems of the European Community - Transatlantic Parallels; (1987) 36 ICLQ 183, at page 186.

¹⁶ Hudec, Robert E.; *Enforcing International Trade Law; The Evolution of the Modern GATT Legal System*, Butterworth Legal Publishers, 1991, 1992, 1993, at page 358.

¹⁷ Mancini, G. Federico "The Making of a Constitution for Europe" (1989) 26 C.M. L. Rev. 595-614, at page 595.

¹⁸ Eleftheriadis, Pavlos; "Aspects of European Constitutionalism"; ECR 1996 21(1), 32-42, at page 33.

¹⁹ Coleman, William D. and Tangermann, Stefan; *The 1992 CAP Reform, the Uruguay Round and the Commission: Conceptualising Linked Policy Games*, J.Com.Mar.St. 1999, 37(3), 385-405, at page 387.

therefore, subject to formal governance".²⁰ The WTO is restricted in that its structure is that "of attribution", so it "has not been given the authority to cope with market distortions stemming from strategic market behaviour amongst the global firms"²¹ which strongly influence the process and effect of global trade. As Ladefoged Mortensen has stated "globalisation is governed by a complex network of interconnected sites of governance in which private and public actors bargain".²² These other actors constantly influence the development of the case law of the WTO panel process, and therefore the WTO, as a site for "genuine rule-based governance of globalisation... remains incomplete".²³

That the "rule of law", or a "rule-based" or "rule-oriented system" is beneficial to the operation of market economies is recognised by Jackson, as "a constantly recurring theme in many writings".²⁴ Jackson notes when comparing the EC and the WTO, that the EC "strikes a foreign observer as remarkably "rule/court" - oriented even when compared with the governments of some of its member states".²⁵ With regard to the WTO, he uses the term "rule orientation", as opposed to the terms "rule of law" or "rule-based system". He says that the term "rule orientation implies a less rigid adherence to 'rule'" and allows for more fluidity in approach, thereby facilitating a system of bargaining and negotiating which permeates the WTO system.²⁶ This is reflected in the fact that "purely bilateral dispute settlement proceedings remain an exception in the WTO".²⁷ Third party intervention has been so frequent in GATT/ WTO dispute resolution that, by Rosas' calculations,²⁸ in the first 22 panel or Appellate Body reports, "third parties were absent in only three".²⁹ In addition, intervention by third

²⁰ Op. cit. footnote no. 2, at page 18.

²¹ Ibid. at page 183.

²² Ibid. at page 203.

²³ Ibid. at page 203.

²⁴ Jackson, John H.; *The Jurisprudence of GATT and the WTO; Insights on treaty law and economic relations*, Cambridge University Press, 2000, at page 7.

²⁵ Ibid. at page 47.

²⁶ Ibid. at page 8.

²⁷ Op. cit. footnote no. 3, at page 34.

²⁸ Op. cit. footnote no. 9, at page 83.

²⁹ Namely *Japan-Taxes on Alcoholic Beverages*, WTDS8, 10-11/AB/R, 4 October 1996.

parties can result in a veritable rugby scrum, with the first *Bananas*³⁰ case having 17 intervening parties, and *Canada - Patent Protection for Pharmaceutical Products*,³¹ 11 Members,³² with the recent *EC- Export Subsidies on Sugar* case having 4 appellants,³³ and 22 third country interveners, a total of 26 parties in all.³⁴ The multiplicity of interveners reflects the fact that intervention need not be on behalf of either party, but can reflect a view independent of the disputing parties.³⁵ Intervention can occur in "all four phases of GATT/WTO dispute settlement", namely; "consultations, panel proceedings, appellate review, and multilateral surveillance of the implementation measures".³⁶ Under Article 10 DSU third parties "have an opportunity to be heard by the panel, and shall receive the first written submission of the parties to the dispute".³⁷ The WTO panel decisions of the first *Bananas* case³⁸ and the *Hormones* case³⁹ developed this process, in limited circumstances to "enhanced" third party rights, "with 'broader participatory rights', including the right to attend fully both substantive meetings of the panel and to make a statement also at the second meeting".⁴⁰ While only the parties to the dispute may appeal to the Appellate Body, third parties continue to have a right to be heard⁴¹ on appeal.⁴²

Canada - Certain Measures Concerning Periodicals, Report of the Appellate Body, WT/DS31/AB/R, 30 June 1997, and *United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or above from Korea*. WT/DS 99/R, 29th January 1999.

³⁰ *European Communities - Regime for the Importation, Sale and Distribution of Bananas, complaints by Ecuador, Guatemala, Honduras, Mexico and the United States* (WT/DS 27).

³¹ *Canada - Patent Protection for Pharmaceutical Products*, WT/DS114/9, panel report dated the 27/4/00.

³² Op. cit. footnote no. 9, at page 83, footnote no. 24.

³³ one of which being the EC.

³⁴ *European Communities - Export subsidies on Sugar*, WT/DS265/29, WT/DS266/29, WT/DS283/10, 15th October 2004.

³⁵ Op. cit. footnote no. 9, at page 84.

³⁶ Op. cit. footnote no. 3, at page 34.

³⁷ Op. cit. footnote no. 9, at page 84.

³⁸ Op. cit. footnote no. 30.

³⁹ *EC Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, 13 February 1998, para. 133.

⁴⁰ Op. cit. footnote no. 9, at page 84.

⁴¹ Pursuant to Article 17.4 DSU.

⁴² Op. cit. footnote no. 9, at page 84 et seq.

The ECJ, for its part, permits the more traditional joinder of cases, both under its case law,⁴³ and under Article 43 of the ECJ's Rules of Procedure.⁴⁴ Member States, not only of the EC, but also the EEA, and EC and EEA institutions have the right to "submit written observations", and/or appear at a hearing⁴⁵ and present their argument orally.⁴⁶ Intervention in a case between other parties by a Member States or an institution of the EC, is also permitted under ECJ rules; however, in contrast with the WTO provisions, intervention "must be limited to supporting the submissions of one of the parties".⁴⁷ This limitation prevents the development of a WTO rugby scrum, and keeps matters neatly focused on two sides of a legal argument. This neatness in legal approach is also reflected in the fact that, contrary to the continuing opportunity for intervention by third parties in all of the "all four phases of GATT/WTO dispute settlement",⁴⁸ in the EC, as set out in *Breedband v. Acieries du Temple*,⁴⁹ intervention by third parties is limited to the period prior to judgment.⁵⁰ (In very limited circumstances third party proceedings after judgment are permitted in ECJ jurisprudence.)⁵¹

The WTO can therefore be classified as a weak enforcer, a weak monitor, and a weak legitimiser,⁵² possibly its optimal status, given that "globalisation cannot be regulated by institutions of a classic, intergovernmental nature, even if such institutions are intended to be universal", however this view is debatable.⁵³ Whether this situation will continue to pertain still has to be established. The GATT/WTO legal system has developed rapidly from its Wyndham-White

⁴³ Joined Cases 28, 29 and 30/62 *Da Costa en Schaake v. Nederlandse Belastingadministratie* [1977] ECR 1795.

⁴⁴ Op. cit. footnote no. 10, at page 90.

⁴⁵ As happened in Case 48/74 *Charmasson v. Minister for Economic Affairs* [1974] ECR 1383, 1391; [1975] 2 CMLR 208.

⁴⁶ Op. cit. footnote no. 10, at page 92.

⁴⁷ Ibid. at page 97.

⁴⁸ Op. cit. footnote no. 3, at page 34.

⁴⁹ Joined Cases 42 and 49/59 Third Party Proceedings *Breedband v. Acieries du Temple* [1962] ECR 145, 158.

⁵⁰ Op. cit. footnote no. 10, at page 107.

⁵¹ Ibid. generally for further details on third party proceedings. This issue will be further examined in chapter 7, in the context of the differing procedures during litigation at the ECJ and at the WTO panels and Appellate Body.

⁵² Op. cit. footnote no. 2, at page 186.

⁵³ Ibid. at page 190.

period, of "'negotiating' atmosphere of multilateral diplomacy, to a more 'arbitration' - oriented procedure designed impartially to arrive at the truth and the best interpretation of the law."⁵⁴ It may well continue to develop in unanticipated directions in the future.

2. GATT - development of a legal system

GATT 1947⁵⁵ came into existence with "fundamental flaws in its institutional underpinnings"⁵⁶ with the demise of the Havana Charter. As stated by Ladefoged Mortensen, it was an "international organisation without any legal personality based upon a provisional agreement, provisionally staffed, and funded on an ad hoc basis".⁵⁷ GATT's successor, the WTO, is itself subject to a "number of structural imperfections",⁵⁸ given that it is a "member-driven network organisation" with "asymmetrical distribution of power and resources in the world economy".⁵⁹ The development of the GATT/WTO legal system has to be understood against this backdrop of this asymmetrical distribution of power and resources. Given this problematic start, it is no surprise that GATT took some time to find its way. GATT started its existence in the realm of unchallenged diplomacy in the 1950's. By the 1960's the two main trading blocks, the EC and the US were taking an anti-legalistic approach in the face of increasing demands for GATT issues to be resolved in a legal manner.⁶⁰ Adjustments still needed to be made to put the damaged-from-birth infant structure of GATT, which was developing rapidly in the 1960's, before a legal system could develop. As stated by Hudec, "the 1960s can be seen as a period when GATT more or less suspended its legal system while it tried to sort out, by negotiation, the legal and economic

⁵⁴ Jackson, John J.; *Restructuring the GATT System*, Royal Institute of International Affairs, London 1990, at page 63.

⁵⁵ As discussed in detail in chapter 4.

⁵⁶ *Op. cit.* footnote no. 2, at page 178.

⁵⁷ *Ibid.* at page 178 et seq.

⁵⁸ *Ibid.* at page 178.

⁵⁹ *Ibid.* at page 178.

⁶⁰ *Op. cit.* footnote no. 16, at page 12.

adjustments that were needed to accommodate its new members and its new agenda."⁶¹

The opening of the Tokyo Round negotiations in the 1970's brought with it the need to take a more legalistic stance, with the U.S. now favouring a more legalistic approach, with the domestic need to prove "stronger enforcement of US trade agreement rights".⁶² The dispute resolution mechanism was increasingly resorted to during the 1970's, however it was only with the 1980's that law, as a discipline, came to the fore in the GATT process. Panel procedures were increasingly "depoliticised" with the increasing use of precedent in GATT panel reports. The dispute settlement rules were codified for greater clarity, and GATT opened its legal office in 1983 "in order to improve expertise, quality, credibility and confidence in panel findings".⁶³ As will be discussed in this chapter, the development of this global legal system was developed in the post-WTO era.

2.1 Nature of law at the GATT/WTO level

The issue of legal precedent is key to the development of a legal system. While under the 1947 system earlier panel reports could certainly be cited in subsequent cases "neither the manner they were made nor the manner they were adopted were rigorous enough to entitle the precise legal rulings in such decisions to binding effect on future controversies".⁶⁴ GATT cases were originally referred to using numeric "cryptic BISD citations",⁶⁵ in a manner that "only insiders could understand", possibly "trying to hide the common law process".⁶⁶ The development of a practice of precedent can be traced from the *Spring Assemblies*⁶⁷ case of 1982, with that panel ruling having been "adopted with a

⁶¹ Ibid. at page 13.

⁶² Ibid. at page 13.

⁶³ Op. cit. footnote no. 2, at page 191, footnote no. 41.

⁶⁴ Op. cit. footnote no. 16, at page 263.

⁶⁵ Ibid. at page 265.

⁶⁶ Ibid. at page 265.

⁶⁷ *US - Imports of Certain Automotive Spring Assemblies* Panel Report adopted on May 26, 1983, BISD 30S/107.

reservation that its adoption would not bar further challenges to the U.S. section 337 law",⁶⁸ thereby recognising the possibility of a form of binding precedent for rulings not subject to such a reservation.

By the end of the 1980's rulings were being "laced with citations to earlier panel rulings".⁶⁹ By 1989, the *Canadian ice-cream and yoghurt*⁷⁰ panel decision contained 12 references to earlier cases.⁷¹ The two 1989 adopted *EEC apple restrictions* panel rulings,⁷² in cases brought by Chile⁷³ and the United States,⁷⁴ ruled that they were not bound by an earlier 1980 panel decision brought by Chile against the EC on the same circumstances.⁷⁵ Three reasons were given by the 1989 panels for this approach, 1. "the earlier panel had not explained its conclusions", 2. An even earlier 1978 panel decision conflicted with the 1980 decision, and 3. "the panel's terms of reference called for independent judgment".⁷⁶

Divergent practices developed in, for example, the area of the perishability of agricultural goods, an exception to the application of Article XI:2(c)(I). The *Japan-12* panel ruling⁷⁷ did not refer to an earlier 1978 panel report on the same issue. *Canadian ice-cream and yoghurt*,⁷⁸ explicitly stated that it would not follow the 1978 decision.⁷⁹ The *Oilseeds* panel⁸⁰ of 1990 cited three times an

⁶⁸ Op. cit. at footnote no. 16, at page 263.

⁶⁹ Ibid. at page 265.

⁷⁰ *Canada - Import Restrictions on Ice Cream and Yoghurt*, Panel Report adopted on 5th December 4, 1989, BISD 36S/68.

⁷¹ Op. cit. footnote no. 16, at page 265.

⁷² which were asked to examine the EC restrictions on apples against the requirements of Article XI:2 (c)(I) or (ii).

⁷³ *EEC - Restrictions on imports of Dessert Apples - Complaint by Chile* Panel Report adopted on June 22, 1989, BISD 36S/93.

⁷⁴ *EEC - Restrictions on Import of Apples - Complaint by the US*. Panel Report adopted on June 22, 1989, BISD 36S/135.

⁷⁵ Op. cit. footnote no. 16, at page 244.

⁷⁶ Ibid. at page 264.

⁷⁷ *Japan - Restrictions on Imports of Certain Agricultural Products*, Panel Report adopted on March 22, 1988, BISD 35S/163.

⁷⁸ Op. cit. footnote no. 70

⁷⁹ Op. cit. footnote no. 16, at page 264.

⁸⁰ *EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins ("Soya-Panel")*. Panel Report adopted on January 25, 1990, BISD 37S/86.

earlier, 1982, un-adopted ruling of the *Canned Fruit* panel.⁸¹ As stated by Hudec, "the fact that the two parties ended up debating the meaning of the *Canned Fruit* panel ruling in the subsequent GATT lawsuit was a defining moment in the use of precedent in GATT law". Hudec interpreted this case as an example that the "'authority' of earlier panel rulings depends simply and solely on how much sense they make",⁸² thus reinforcing the "rule orientation" classification of Jackson in 2000.⁸³

2.2 GATT interpretative standards

The interpretative standards to be operated by the GATT panels have wavered between flexible construction, in the early days, to strict interpretation, since, in particular the 1980s. The *FIRA case*⁸⁴ in 1984, developed a "national treatment" test that "struck down commitments giving even the slightest advantage to Canadian goods", under Canada's Foreign Investment Review Act.⁸⁵ This approach was followed in the *Superfund*⁸⁶ panel decision of 1987, when the panel refused to allow a *de minimis* exemption for a tax differential between the treatment of national and foreign goods of 0.19 percent.⁸⁷ The *Section 337* decision⁸⁸ of 1989 followed this trend, whereby the panel held that the test of "no less favourable treatment", in Article III GATT 1947, had to be met for each individual importer, and was not one of a judgment of the effect of the act, contrary to the U.S. view on the matter.⁸⁹

⁸¹ *United States v. European Community: Production Aids on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes*. Complaint: 19 March 1982 (L/5306).

⁸² Op. cit. footnote no. 16, at page 265.

⁸³ Op. cit. footnote no. 24 at page 278.

⁸⁴ *Canada - Administration of the Foreign Investment Review Act (FIRA)* Panel Report adopted on February 7, 1984, BISD 30S/140.

⁸⁵ Op. cit. footnote no. 16, at page 265.

⁸⁶ *US - Taxes on Petroleum and Certain Imported Substances ("Superfund Act")* Panel Report adopted on June 17, 1987, BISD 34S/136.

⁸⁷ Op. cit. footnote no. 16, at page 266 et seq.

⁸⁸ *US - Section 337 of the Tariff Act of 1930* Panel Report adopted on November 7, 1989, BISD 36S/345.

⁸⁹ Op. cit. footnote no. 16, at page 267.

2.3 Burden of Proof

The issue of the burden of proof of compliance with GATT exemptions has also been dealt with by a series of GATT panels, starting with *Japan-12*⁹⁰ in 1988, and followed by both the Chilean⁹¹ and US⁹² complaints about EC apple restrictions in 1989, and the *Canadian ice cream and yoghurt* case,⁹³ also in 1989. These panels held that, despite the difficulty that it would pose for the contracting parties, the burden of proof in order to comply with a GATT exemption would lie with the contracting party claiming the exemption. They held that any other interpretation would "create gaps in GATT legal protection that would be fatal to the balance of reciprocity".⁹⁴

2.4 Definition of Actionable Harm

The definition of actionable harm was developed in the more legalistic 1980s, in favour of a "stronger more administrable approach based on proof of competitive disadvantage",⁹⁵ rejecting the previous "cause-and-effect trade damage",⁹⁶ starting with the 1979 *Soybean Oil*⁹⁷ case. This change was hard fought. The panel in *Soybean Oil* adopted the "trade damage" test, however the US had the panel decision overruled on that basis.⁹⁸ This was followed by the *Japanese leather quotas* case⁹⁹ in 1983, which held that "even unfilled quotas cause harm" as its affected planning. The un-adopted 1982 *Canned Fruit*¹⁰⁰ panel report attempted to develop the doctrine of "trade damage" further, with a finding

⁹⁰ Op. cit. footnote no. 77.

⁹¹ Op. cit. footnote no. 73.

⁹² Op. cit. footnote no. 74.

⁹³ Op. cit. footnote no. 70.

⁹⁴ Op. cit. footnote no. 16, at page 268.

⁹⁵ Ibid. at page 268.

⁹⁶ Ibid. at page 269.

⁹⁷ *United States v. Spain: Measures Concerning Domestic Sale of Soyabean Oil*, Complaint: 1 November 1979 (L/4859).

⁹⁸ Op. cit. footnote no. 16, at page 268.

⁹⁹ *United States v. Japan: Measures on Imports of Leather [II]* Complaint: 5 January 1983 (L/5440).

¹⁰⁰ Op. cit. footnote no. 81.

that "proof of cause-and-effect trade damage was not needed for a case of non-violation nullification and impairment".¹⁰¹ The EC objected and this resulted in the non-adoption of the panel ruling. The 1987 *Superfund*¹⁰² decision reinforced the development of the "trade damage" doctrine with the finding that a *de minimis* effect was not sufficient to avoid breaching GATT rules. This approach was reinforced in *Japanese Alcoholic Beverages*¹⁰³ later that same year. The issue arose again in the *EC Oilseeds* case.¹⁰⁴ The panel again said that proof of trade damage was not necessary, with proof of a "competitive disadvantage" sufficing.

3. The development of law under GATT 1947

The cause of action under GATT 1947 was the Article XXIII claim of "Nullification and Impairment" of rights. The exercise of rights under this cause of action, and the operation of the GATT legal framework as a whole have been problematic at times, as evidenced in the *Canadian Eggs*¹⁰⁵ case, where an attempt was made to enforce a provision in GATT 1947 which no of the main GATT member states was obeying.¹⁰⁶ The 1976 *DISC* cases,¹⁰⁷ which concerned US and EC tax regimes exposed a number of weaknesses in the GATT dispute settlement system, to include "the lack of any institutionalized source of high quality legal analysis,"¹⁰⁸ the GATT secretariat still having no legal office at this stage, or an appellate system, to deal with errors in panel rulings. The general view of *DISC* was that the panels had made a "pretty serious mistake" in their approach to EC tax laws, which lead to a blocking of the adoption of the panels' reports in these cases.

¹⁰¹ Op. cit. footnote no. 16, at page 269.

¹⁰² Op. cit. footnote no. 86.

¹⁰³ *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* Panel Report adopted on November 10, 1987.

¹⁰⁴ Op. cit. footnote no. 80.

¹⁰⁵ *Canadian Import Quotas on Eggs ("advisory ruling")*, WP report, adopted on February 17, 1976, BISD 23S/91.

¹⁰⁶ Op. cit. footnote no. 16, at page 45.

¹⁰⁷ *US Tax Legislation (DISC)* Panel report presented on November 12, 1976, BISD 23S/98.

¹⁰⁸ Op. cit. footnote no. 16, at page 45.

The *MIPS* case,¹⁰⁹ which dealt with minimum import prices, brought panel hearings to a new level of legal argument, with the lawyers from USTR, operating their first section 301 action against the EC, adopting a legal "carpet bombing" strategy,¹¹⁰ with diplomacy no longer an option as a tactic. The now infamous U.S. section 301 of the Trade Act 1974¹¹¹ itself became the subject matter of a WTO panel report in 2000.¹¹² Section 301 procedures permit either the US government to "self-initiate" or a "citizen to file a petition", not just on the basis that "foreign actions violate international rules" which are classified by the statute as being "unjustifiable", but also on the basis that foreign legislative practices are "unreasonable" with much latitude being given to the definition of such practices which can be deemed "to be unfair and deserving countermeasures".¹¹³ A section 301 action does not require "injury" proof, or even "violation of a trade agreement". It is sufficient that a measure is something which "burdens or restricts United States commerce".¹¹⁴ Having initiated the procedure the US government is "not obliged to abide from the outcome of the procedure", not is it obliged to "refrain from action until the international procedures are formally completed".¹¹⁵ (The EC for its part, operates the Trade Barrier Regulation,¹¹⁶ which will be discussed in chapter 6.)

The carpet bombing strategy adopted in the *MIPS* case exposed many flaws in the dispute resolution system; the "existing procedure's capacity for legal

¹⁰⁹ *United States v. European Community: Programme of Minimum Import Prices (MIPS), Licenses, etc. for Certain Processed Fruits and Vegetables*. Complaint: 29 March 1976 (L/4321).

¹¹⁰ Op. cit. footnote no. 16, at page 48.

¹¹¹ As amended by Trade Agreements Act 1979, the Tariff and Trade Act 1984 and the Omnibus Trade and Competitiveness Act 1988. Provisions are now found in the Trade Act of 1974 (as amended to December 1988), sections 301-306, 19 USCA Art 2411-2416 (1980 and Supp. 1988). As to application to services, see 19 USCA Art 211 (e)(1)(A) (1980 and Supp. 1988).

¹¹² *United States - Section 301-310 of the Trade Act of 1974*, WT/DS152/R Panel Report adopted by the DSB on January 27, 2000.

¹¹³ Op. cit. footnote no. 55, at page 71 et seq.

¹¹⁴ Ibid. at page 72.

¹¹⁵ Ibid. at page 71.

¹¹⁶ Council Regulation 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization", OJ L 349/71 of 31 December 1994, amended by Council Regulation 356/95, OJ L 41/3 of 23 February 1995.

analysis was inadequate to the task",¹¹⁷ despite providing the longest panel report to that date under the GATT 1947 system. This lack of adequacy of the panel procedures to deal with legal analysis pervaded many of the disputes at the time, however it was felt that cases such as *Animal Feed Proteins*¹¹⁸ were dealt with reasonably successfully. Commentators' view was that cases such as *DISC* and *MIPS* were "creating even more pressure on the meagre legal resources of the existing system".¹¹⁹ The creation of the GATT legal office in the 1980's was partly as a result of these cases,¹²⁰ contributing *inter alia*, to a strengthening of the GATT legal process.¹²¹

The post Tokyo Round litigation of the United States, much of which was based on s.301 actions, and against the backdrop of the new Tokyo Round codes, focused on the U.S.'s problems with the EC's CAP. It should be noted that the plurilateral agreements on Dairy products and Bovine Meat, were both designed "to accomplish price maintenance rather than trade liberalisation".¹²² The five U.S.-E.C. cases were *Wheat Flour*,¹²³ *Pasta*,¹²⁴ *Canned Fruit*,¹²⁵ *Citrus*,¹²⁶ and *VAT*.^{127 128} Had the U.S. complaints been successful then the CAP would have had, at that time, to be radically altered, such a change not having been reflected in the Tokyo Round agreements.¹²⁹ The EC won the *Wheat Flour* case, the US won the others, but all of these panel rulings were blocked by the losing party, with the exception of the *VAT* panel report, which was "just barely adopted after a

¹¹⁷ Op. cit. footnote no. 16, at page 50.

¹¹⁸ *EEC - Measures on Animal Feed Proteins* Panel Report adopted on March 14, 1978, BISD 25S/49.

¹¹⁹ Op. cit. footnote no. 16, at page 57.

¹²⁰ Ibid. at page 129.

¹²¹ Ibid. at page 137 et seq.

¹²² Ibid. at page 27.

¹²³ *European Community - subsidies on exports of wheat flour*; SCM/42 (21 March 1983).

¹²⁴ *United States v. European Community: Subsidies on Exports of Pasta Products*; Complaint: 24 February 1982 (SCM/Spec/8) (Subsidies Code).

¹²⁵ Op. cit. footnote no. 81.

¹²⁶ *European Communities - Tariff Preferences to Citrus Products of certain countries in the Mediterranean Region* (request for negotiations 8th August 1980, L5012).

¹²⁷ *Panel on Value Added Tax and Threshold Panel Report* adopted on May 16, 1984 by the Committee on Government Procurement, BISD 31S/247.

¹²⁸ Op. cit. footnote no. 16, at page 145 et seq.

¹²⁹ Ibid. at page 146.

long struggle".¹³⁰ It should be noted that the blocking mechanism is no longer available in the post- WTO regime; the expiration of the "peace clause", to be analysed further in chapter 7, has since been added to the legal mix in this area.

3. 1 Value Added Taxes (VAT)¹³¹

The VAT case was a complaint by the U.S. against the E.C., pursuant to the provisions of the Tokyo Government Procurement Code. This case concerned the definition of "contract value", with the EC using a VAT inclusive figure, with the majority of GATT contracting parties using a VAT exclusive figure, which once it met the code threshold¹³² was subject to the provisions of the code. The panel found against the EC, ruling that whatever internal problems the EC had on the matter, "such problems could not change the interpretation of a legal document".¹³³ This lack of regard for internal problems may have an effect on the potential development of the EC's multifunctionality argument with regard to its agriculture. The findings of the panel were eventually adopted, and the Community undertook to "work towards compliance, but with 'flexibility'".¹³⁴

4. After the Tokyo Round

After the Tokyo Round the panels, in a more robust legal fashion, began to develop GATT jurisprudence. *Norway Textiles*¹³⁵ had established that Article XIX restrictions, and the Tokyo Safeguards Code, could not be used selectively to target particular countries.¹³⁶ The *Coffee*¹³⁷ panel held that the definition of "like

¹³⁰ Op. cit. footnote no. 16, at page 146.

¹³¹ Op. cit. footnote no. 127.

¹³² SDR 150,000.

¹³³ Op. cit. footnote no. 16, at page 162.

¹³⁴ Ibid. at page 162.

¹³⁵ *Norway - Restrictions on Imports of Certain Textile products*; Panel Report adopted on June 18, 1980, BISD 27S/119.

¹³⁶ Op. cit footnote no. 16, at page 134.

¹³⁷ *Spain - Tariff Treatment of Un-roasted Coffee* Panel Report adopted on June 11, 1981, BISD 28S/102.

product" was to include all products treated under one tariff item, thereby broadening the definition of "like product", leaving "governments ... less free to discriminate"¹³⁸ between products, thereby adding to free movement of goods. The 1982 *Tuna* case¹³⁹ was, however, more problematic. While appearing to be a successful case on paper, the U.S. managed to force Canada to sign an international fisheries agreement, in order to comply with U.S. law. The strong arm tactics operating in this case "amounted to a failure for GATT law",¹⁴⁰ with the non-GATT compliant U.S. legislation remaining on the statute books. The *Quartz Watches*¹⁴¹ case was more successful from a GATT law perspective, with the panel rejecting the EC's argument that "a practice acquiesced in for a long period becomes a 'law-creating fact,' altering the initial legal prohibition".¹⁴² Other cases of the period were not so successful, with the panel finding in *Spring Assemblies*¹⁴³ being set aside, and the report in *Vitamin B-12*,¹⁴⁴ while adopted, remaining completely unintelligible.¹⁴⁵

5. GATT 1947 and the agricultural cases

Operating against the backdrop of UN Food and Agriculture Organisation (FAO) and other commodity agreements,¹⁴⁶ and the non-legally binding provisions of the Charter of Economic Rights and Duties of States,¹⁴⁷ GATT 1947 did not lead to the free trade of agricultural products. For its part GATT 1947 only provided for differentiated treatment for agricultural products in Article XI, which

¹³⁸ Op. cit. footnote no. 16, at page 141.

¹³⁹ *US-Prohibition of Imports of Tuna and Tuna Products from Canada*; Panel Report adopted on February 22, 1982, BISD 29S/91.

¹⁴⁰ Op. cit. footnote no. 16, at page 141.

¹⁴¹ *EEC- Quantitative Restrictions against Imports of Certain Products from Hong Kong*; Panel Report adopted in July 12, 1983, BISD 30S/129.

¹⁴² Op. cit. footnote no. 16, at page 142.

¹⁴³ Op. cit. footnote no. 67.

¹⁴⁴ *Vitamins* Panel Report adopted on October 1, 1982, BISD 29S/110.

¹⁴⁵ Op. cit. footnote no. 16, at page 142.

¹⁴⁶ To include tea, citrus fruits, rice, meat, bananas, oil-containing seeds, and oils and fats. van Houtte, Hans; *The Law of International Trade*, Sweet & Maxwell, London, 1995, at page 112.

¹⁴⁷ Which provided that it was the "duty of all states to participate in multilateral agreements on basic products, for the purpose of, amongst other things, the establishment of fixed, compensatory and equitable prices", van Houtte, Hans; *The Law of International Trade*, Sweet & Maxwell, London, 1995, at page 111.

deals with the General Elimination of Quantitative Restrictions, with the balance of the GATT 1947 regime to apply to both agricultural and non-agricultural goods. The Article XI section 2 exemptions were drafted "fairly restrictively",¹⁴⁸ however these exceptions widened with time.¹⁴⁹ Two major factors influenced this widening, "the waiver given to the Americans"¹⁵⁰ and the creation of the European Communities".¹⁵¹

*Japan-12*¹⁵² was an early attempt to impose GATT rules on agriculture, despite years of neglect in this area. The panel in this case was "quite strict in respecting the legal text".¹⁵³ This was the first systematic application of Article XI:2(c)(I), which deals with import restrictions on any agricultural or fisheries product, imported in any form. The *Japan-12* panel gave an explanation of Article XI:2(c)(I), and what each section meant, based on a strict legal interpretation of the text. The panel found that "some requirements were found to be essentially meaningless, while others proved extremely difficult to comply with".¹⁵⁴ The burden of proof was with Japan to prove compliance with the provision, as Article XI:2(c)(I) was an exception to the general rules of GATT.¹⁵⁵ On the facts, the panel found that none of Japan's restrictions complied with Article XI:2(c)(I). The *Semiconductor* case elaborated on the ruling in *Japan - 12*, by holding that "administrative guidance would be treated as a restriction if (1) it created an inducement to comply with the restrictive policy and (2) it was necessary to successful implementation of the restrictive policy".¹⁵⁶

¹⁴⁸ Delcros, Fabian; The Legal Status of Agriculture in the World Trade Organization, State of Play as the Start of Negotiations, *Journal of World Trade* 36(2), 219-253, 2002, at page no. 221.

¹⁴⁹ *Ibid.* at page 221.

¹⁵⁰ Dealt with in Chapter 4.

¹⁵¹ *Op. cit.* footnote no.148, at page 222.

¹⁵² *Op. cit.* footnote no. 77.

¹⁵³ *Op. cit.* footnote no. 16, at page 215.

¹⁵⁴ *Ibid.* at page 215.

¹⁵⁵ *Ibid.* at page 215.

¹⁵⁶ *Ibid.* at page 217.

The issue of EC subsidies arose in the *EC-Sugar Subsidy* cases.¹⁵⁷ Twin panels were set up in 1979 dealing with Australia and Brazil's complaints that the EC's export subsidy on sugar was "taking more than an 'equitable share of world export trade' in violation of GATT Article XVI:3".¹⁵⁸ The complaint about the trade in sugar was made against the backdrop of the International Sugar Agreement of 1977,¹⁵⁹ to which the EC was not a party, but by which "member countries voluntarily restrained exports to raise prices", contrary to the ethos of GATT.¹⁶⁰ The international sugar market was therefore "riddled with market-distorting practices on the part of most market participants".¹⁶¹ It would appear that the sugar panels were attempting to avoid a confrontation with the EC. According to Hudec, the US had "signed a secret letter assuring the Community that the Subsidies Code would not be used to attack the fundamental character of the Common Agricultural Policy".¹⁶² The *Sugar* panels, in this highly sensitive political situation, claimed that there was a lack of proof of the "cause-and-effect linkage between EC exports and the market loss" of the complaining states. Rather, they found that "serious prejudice" had been shown as per Article XVI:1, requiring "an obligation to consult about how the subsidy may be limited, with no obligation to agree to anything".¹⁶³

In the case of *EC Apples*¹⁶⁴ the Community, pursuant to its common organisation in fruit and vegetables,¹⁶⁵ attempted to prevent the importation of Chilean apples in order to "remove a temporary apple surplus" in compliance with the requirements of Article XI. It was claimed however, that the surplus in apples

¹⁵⁷ *European Communities - Refunds on exports of Sugar* Panel Report adopted on November 6, 1979, BISD 26S/290.

¹⁵⁸ Op. cit. footnote no. 16, at page 130.

¹⁵⁹ A fuller discussion of commodity agreements and their impact of the development of agriculture within the GATT and WTO framework was addressed in chapter 3.

¹⁶⁰ Op. cit. footnote no. 16, at page 133.

¹⁶¹ Ibid. at page 132.

¹⁶² Ibid. at page 131, referring to R.E. Hudec, "Transcending the Ostensible": Some Reflections on the Nature of Litigation between Governments" 72 *Minnesota Law Review* 101, 111-113 (1987).

¹⁶³ Ibid. at page 134.

¹⁶⁴ *Chile v. European Community: Restriction on Imports of Apples from Chile*; Complaint: 19 June 1979 (L/4805).

¹⁶⁵ Pursuant to Regulation (EEC) No 1035/72 of the Council of 18 May 1972 on the common organization of the market in fruit and vegetables, Official Journal L 118, 20/05/1972 p. 1.

within the EC was not temporary, but rather a systematic problem arising from the operation of the EC's policies, which encouraged the production of apples.¹⁶⁶ The panel, whose report was adopted subject to reservations, did find in the Chile case, that the *EC Apples* provisions "qualified as a restriction on marketing", and that Chile did not have as large a quota to import into the EC as it should have had.¹⁶⁷ The later 1989 cases of *EC Apples (US)*¹⁶⁸ and *Chile*¹⁶⁹ would revisit this issue. Following the test set down in *Japan-12*¹⁷⁰ regarding the interpretation of Article XI:2(c.),¹⁷¹ the 1989 panels, deciding to make up their own mind on the issue, held that the EC's overproduction of apples could not be considered a "temporary surplus" within the terms of Article XI:2(c.)(I). The EC agreed to adopt the report subject to reservations on the interpretation of Article XI:2(c.)(I).¹⁷² A similar case, *Norway Apples and Pears*,¹⁷³ a decade later, based on similar facts, took a similar line, with Norway accepting the ruling of violation.¹⁷⁴ *Korean Beef*¹⁷⁵ which tried, unsuccessfully, to use the "balance-of-payments justification" also fell foul of Article XI:2(c.)(I).¹⁷⁶

Further problems arose with the application of GATT rules to agricultural commodities in the 1979 *Soyabean Oil*¹⁷⁷ case (referred to in the U.S. as the *Soy bean* case). In an effort to protect domestic olive oil producers, Spain had restricted the domestic market of Soyabean oil, requiring the export of Spanish produced soyabean oil, thereby affecting U.S. exports to adjacent markets.¹⁷⁸ The panel ruled that "oil crushed from imported soybeans became a domestic product

¹⁶⁶ Op. cit. footnote no.148, at page 221.

¹⁶⁷ Op. cit. footnote no. 16, at page 135.

¹⁶⁸ Op. cit. footnote no. 74.

¹⁶⁹ Op. cit. footnote no. 73.

¹⁷⁰ Op. cit. footnote no. 77.

¹⁷¹ Op. cit. footnote no. 16, at page 137.

¹⁷² Ibid. at page 135.

¹⁷³ *Norway - Restrictions on Imports of Apples and Pears*. Panel Report adopted on June 22, 1989, BISD 36S/306.

¹⁷⁴ Op. cit. footnote no. 16, at page 242.

¹⁷⁵ *Republic of Korea - Restrictions on Imports of Beef - Complaint by the US*, BISD 36S/268, Panel Report adopted 7th November 1989.

¹⁷⁶ Op. cit. footnote no. 16, at page 243.

¹⁷⁷ Op. cit. footnote no. 97.

¹⁷⁸ Op. cit. footnote no. 16, at page 135.

at that point, so that the restriction against the internal sale of soybean oil was not harming any imported product".¹⁷⁹ Second, internal quantitative restrictions did not violate Article III:5, as domestically produced soyabean oil and imported soyabean oil were treated in a like manner. The panel further held that soyabean oil and olive oil were not "like products" and so could be treated differently.¹⁸⁰ The U.S. prevented the panel's findings from being adopted, and so its contents were merely "noted".¹⁸¹

The 1990 *EC Oilseeds* case¹⁸² revisited this particular commodity. At the time of creation of the EC's CAP the EC had entered into an agreement with the United States on agricultural products. The US agreed to "release tariff bindings on key CAP products", in return for the EC granting "free access (zero tariff bindings) to imports of oilseeds and nongrain animal feeds".¹⁸³ The EC subsidy for the production of oilseeds within the EC was perceived by the U.S. as acting "just like the tariff that the EC had agreed to eliminate",¹⁸⁴ with EC governmental intervention acting to cancel out the previous U.S. advantage. Two issues arose in the panel report, one the EC subsidy, which was paid to crushing mills, rather than to farmers, and secondly, the fact that the subsidy operated to nullify and impair the U.S. tariff binding on oilseeds, and was therefore in breach of Article XXIII GATT. The panel held that "a payment not made directly to the producers is not paid 'exclusively' to them within the terms of Art. III:8(b) of GATT",¹⁸⁵ and that the EC provisions "did not in fact ensure that payments to producers"¹⁸⁶ were incorrectly calculated. The issue of the definition of producer had arisen in the *Manufacturing Beef* case¹⁸⁷ where the panel had refused to extend the term

¹⁷⁹ Ibid. at page 136.

¹⁸⁰ Ibid. at page 136.

¹⁸¹ Ibid. at page 136.

¹⁸² Op. cit. footnote no. 80.

¹⁸³ Op. cit. footnote no. 16, at page 245.

¹⁸⁴ Ibid. at page 246.

¹⁸⁵ Usher, J.A.; *EC Agricultural Law*, 2nd edition, Oxford University Press, 2001, at page 64.

¹⁸⁶ Ibid. at page 64.

¹⁸⁷ *Canada – Imposition of Countervailing duties on Imports of Manufacturing Beef from the EEC*, 13th October 1987, SCM/85.

“producer” to a slaughter house.¹⁸⁸ (It should be noted that neither the Uruguay Round Subsidies and Countervailing Measures Agreement or Agreement on Agriculture provide a definition for “producer”). The *EC Oilseeds* panel¹⁸⁹ further held that the subsidy was not therefore a permitted production subsidy¹⁹⁰ thereby constituting a non-violation nullification and impairment of U.S. rights.

The EC’s system of export subsidies used to compensate for the artificially distorted prices of agricultural commodities within the EC as a result of the operation of the common organisations, was at issue in the un-adopted 1983 *EC Wheat*¹⁹¹ dispute. The US had argued that the EC’s share of the world market was artificially increased as a result of the export subsidy, giving it “more than an equitable share of world trade”.¹⁹² In the U.S.’s view, this also met the “displacement” definition of Article 10:2(a) of the Tokyo’s Subsidies Code.¹⁹³ The hope with this case was that if “GATT law could successfully freeze the size of subsidised EC exports, the present EC agricultural program would smother under an ever-growing pile of surplus product”.¹⁹⁴ This panel refused to follow as precedent the finding in *French Wheat and Flour*¹⁹⁵ and decided to approach the issues in this dispute afresh.

The panel in *Wheat Flour* had a problem with both the EC’s and the U.S.’s theories, and found that it could not make a decision, as it could not find a clear meaning for the “equitable share concept”. The panel agreed with the EC that the world’s wheat flour market was “very artificial and distorted”, with the panel doubting that “there was any standard by which one could impose a legal order on such a market”.¹⁹⁶ They also lacked an undistorted year to use as a comparator.

¹⁸⁸ Op. cit. footnote no. 16, at page 222.

¹⁸⁹ Op. cit. footnote no. 80.

¹⁹⁰ Permitted under GATT Article III:8 (b.), thereby breaching Article III:4 of GATT. Op.cit. footnote no. 1062.

¹⁹¹ Op. cit. footnote no. 125.

¹⁹² Op. cit. footnote no. 16, at page 147.

¹⁹³ Ibid. at page 148.

¹⁹⁴ Ibid. at page 148.

¹⁹⁵ *Measures applied by France to encourage wheat and flour export* (BISD) 7 Supp. (1959) 46.

¹⁹⁶ Op. cit. footnote no. 16, at page 150.

The fact that the US operated a scheme similar to the EC was relevant to the panel decision. The panel did take the view that the U.S.'s argument as to overall "displacement" was inappropriate, and that the test to be used should be "displacement in individual markets".¹⁹⁷ On that basis the panel found that "none of the 17 U.S. claims had been proved".¹⁹⁸ The issues in *Wheat Flour* were never settled with the U.S. subsequently blocking the adoption of this panel report.¹⁹⁹ A subsidy war between the EC and the U.S. followed, all of which led to a greater effort in the run up to the Uruguay Round to address the issue of agricultural subsidies.²⁰⁰ The issue of EC export subsidies has arisen again in the post WTO framework in *EC- Export Subsidies on Sugar*,²⁰¹ when the EC was held by the panel, and confirmed by the Appellate Body to have breached its commitments under the WTO Agreement on Agriculture. The panel held that²⁰² there had been *prima facie* evidence that "since 1995 the European Communities total exports of sugar exceeded its quantity commitment level" in the WTO Agreement on Agriculture, resulting in the nullification and impairment of "benefits accruing to the Complaining parties under the Agreement on Agriculture".²⁰³ The issue of the interaction of the WTO Agreement on Agriculture with the Agreement on Subsidies and Countervailing Measures was also raised in this case, which will be referred to again in later chapters of this thesis.

Another unadopted panel report was the 1983 *Pasta*²⁰⁴ report, a case brought pursuant to the U.S. s.301 procedure. The panel held that the payments to pasta producers to compensate for the higher costs of raw materials due to the

¹⁹⁷ Ibid. at page 150.

¹⁹⁸ Ibid. at page 150.

¹⁹⁹ Op. cit. footnote no. 148, at page 225.

²⁰⁰ Op. cit. footnote no. 16, at page 151.

²⁰¹ *European Communities – Export subsidies on Sugar*, WT/DS265/29, WT/DS266/29, WT/DS283/10, 15th October 2004, and *European Communities – Export subsidies on sugar (brought by Australia)* WT/DS265/AB/R, *European Communities- Export subsidies on sugar (Brought by Brazil)* WT/DS266/AB/R, and *European Communities-Export Subsidies on Sugar (brought By Thailand)* WT/DS283/AB/R, all ruled on by the Appellate Body of the WTO on the 28th April 2005.

²⁰² At paragraph 4 of the Appellate Body report.

²⁰³ at point 300 of the report.

²⁰⁴ Op. cit. footnote no. 104.

operation of the CAP was not permitted, as pasta was not a "primary product" as required by Article XVI, but rather a manufactured good. Article 9 of the Tokyo Subsidy Code, prohibited "all export subsidies on non-primary products".²⁰⁵ No reference in this code was made to the "raw material component of processed agricultural or fisheries products".²⁰⁶ Article XVI:3 of GATT, which dealt with subsidies for primary products, required that "such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product". The US was seeking the removal of "all export subsidies",²⁰⁷ a direct attack against the CAP. The U.S. had, on the adoption of Article XVI:4, reserved its own rights with regard to the subsidy on "raw cotton content of cotton fabric, as a way of equalising the high cost of cotton created by U.S. support prices",²⁰⁸ exactly what the EC was doing with pasta. While other contracting parties had initially objected at the time to the U.S.'s reservation, other countries had adopted practices similar to the U.S. while the U.S. had, over time, abandoned its stance on cotton.²⁰⁹ The U.S. argued that their own behaviour had been on the basis of an explicit reservation, and as no other reservation had been made for primary products, no other contracting party should be exercising an exemption for subsidies for primary products.²¹⁰ The EC blocked the adoption of this report, gaining support for its approach from other contracting parties.²¹¹

A similar line was taken in the *Canadian ice cream and yoghurt* case,²¹² where the Canadians were attempting to protect domestic producers of yoghurt and ice cream from the adverse effects of a domestic policy designed to raise the price of their raw material, milk. As yoghurt and ice cream were not primary

²⁰⁵ Op. cit. footnote no. 16, at page 153.

²⁰⁶ Ibid. at page 153.

²⁰⁷ Ibid. at page 151.

²⁰⁸ Ibid. at page 153.

²⁰⁹ Ibid. at page 153.

²¹⁰ Ibid. at page 154.

²¹¹ Ibid. at page 154.

²¹² Op. cit. footnote no. 70.

products, the panel "condemned the measure", but recognised that Canada could continue to protect its raw milk production.²¹³

5.1 *Canned Fruit*²¹⁴

Another s.301 case, in *Canned Fruit* the EC's subsidy "went a good bit further than equalising the cost of raw materials",²¹⁵ and operated to "equalise all cost differences between EC and foreign producers".²¹⁶ Once again the U.S. launched an all out attack on the CAP, claiming that "all compensatory subsidies" be treated as non-violation nullification and impairment (NV N&I). The Community's defence was to the effect that a NV N&I claim "required a specific cause-and-effect showing of trade damage resulting from the subsidy".²¹⁷ The panel found that the payments on dried grapes were GATT compliant, but that those on canned fruit were in breach of GATT provisions, finding that the "subsidy constituted a new form of artificial disadvantage to the extent it exceeded the amount necessary to equalise world prices an the higher CAP prices of raw fruit".²¹⁸

The findings in *Pasta* and *Canned Fruit* closely mirrored each other, both permitting "the EC to neutralise the cost disadvantage the EC itself had created by imposing very high domestic prices for raw materials under CAP price supports".²¹⁹ The findings of both cases only extended to limit overcompensation.²²⁰ The issue of "trade damage" was also dealt with in *Canned Fruit*, developing on the finding in *Soybean Oil*, "the panel ruled that even an equity-based finding of NV N&I did not require cause-and-effect proof of lost

²¹³ Op. cit. footnote no. 148, at page 211.

²¹⁴ Op. cit. footnote no. 81.

²¹⁵ Op. cit. footnote no. 16, at page 155.

²¹⁶ Ibid. at page 155.

²¹⁷ Ibid. at page 155.

²¹⁸ Ibid. at page 156.

²¹⁹ Ibid. at page 156.

²²⁰ Ibid. at page 156.

exports".²²¹ It was sufficient to prove that the government action had resulted in a change in "competitive position".²²² While the EC accepted the point about overcompensation, the EC continued to block the panel report on *Canned Fruit* in the GATT Council on the basis of its finding that "proof of cause-and-effect trade damage was not required for a finding of non-violation nullification and impairment".²²³ The dispute was eventually settled and the panel report withdrawn.²²⁴

5.2 *Citrus*²²⁵

As referred to in chapter 3 the GATT *Citrus* dispute arose as a result of the EC's development of "Euro-Med" agreements. While Article XXIV:5(c.) GATT permitted exceptions to the MFN status for "interim agreements" leading to either customs unions or free trade areas, a question arose as to whether the EC's Euro-Med agreements were really such "interim agreements", particularly as only one of such partner states²²⁶ had, to that date, complied "with the GATT's requirement of prompt and comprehensive elimination of trade barriers".²²⁷ The US claim was that such "Euro-Med" agreements did not comply with the GATT definition of "interim agreements", and that the preferential access of citrus fruit from such countries was in breach of the MFN principle. It was felt that the US, pursuant to a s.301 complaint, was attempting to use the argument as leverage to gain access to the EC market, rather than dismantling the network of "Euro-Med" agreements.²²⁸ The GATT panel found the *Citrus* complaint difficult to deal with. The panel found that the investigation of "the conformity of the agreements with GATT Article XXIV",²²⁹ had to be done pursuant to review proceedings under

²²¹ Ibid. at page 156.

²²² Ibid. at page 157.

²²³ Ibid. at page 157.

²²⁴ Ibid. at page 157.

²²⁵ Op. cit. footnote no. 126.

²²⁶ Spain.

²²⁷ Op. cit. footnote no. 16, at page 157.

²²⁸ Ibid. at page 158.

²²⁹ Ibid. at page 160.

Article XXIV:7, and that until such a review had been conducted then the legal status of such agreements under GATT was unresolved.²³⁰ The panel found that the US was entitled to expect benefits from GATT Article 1 on the MFN principle, and that this MFN status "had been impaired" by the existence of the "Euro-Med" agreements,²³¹ with a consequent requirement for the EC to "repair trade losses in two product categories (oranges and lemons) where there had been a meaningful trade diversion". The EC was aggrieved that the GATT-legality of the "Euro-Med" agreements was still unresolved, and blocked the adoption of the panel report by the GATT Council.²³² The main problem with the findings was the uncertainty of the finding, as legal uncertainty as to the "Euro-Med" agreements could lead to them being found in compliance with the provisions of Article XXIV GATT, therefore there would be no possibility of finding a nullification and impairment action under Article XXIII.²³³ The U.S. did agree during the course of the *Citrus* case that "it would make no further legal challenges to the EC's regional agreements with Mediterranean countries".²³⁴

6. The 1982 Ministerial Declaration

By the 1982 Ministerial Declaration the EC was adopting a more positive attitude to dispute resolution by GATT, as evidenced by its use of the system "more frequently and more positively".²³⁵ The Ministerial Declaration highlighted the "existing strains" in the system which were "aggravated by differences of perception regarding the balance of rights and obligations under the GATT".²³⁶ The Declaration recommended that the panels "reach clear decision, and follow

²³⁰ Ibid. at page 160.

²³¹ Ibid. at page 160.

²³² Ibid. at page 160.

²³³ Ibid. at page 160.

²³⁴ Ibid. at page 161.

²³⁵ Ibid. at page 167.

²³⁶ Ibid. at page 166, quoting the Ministerial Declaration, Thirty-Eighth Session, BISD, 29th Supp. 10 (1983).

through with clear recommendations for action", which effectively called for a "very significant change of practice",²³⁷ from one based on diplomacy.

6.1 Post 1982 litigation

The *FIRA* case²³⁸ dealt with Canadian legislation imposing on foreign investors trade related requirements. The U.S. claimed that these provisions were in breach of either GATT Articles III or XI. Canada replied stating that foreign investment regulation was outside the provisions of GATT. The panel delivered a cogent legally argued report outlining how foreign investment matters interacted with GATT regulation, stating that "various buy-Canadian requirements were a violation of GATT Article III, but that no GATT obligation prohibited the export performance requirements" of the Canadian act.²³⁹ Canada eventually accepted the report and complied with its findings. Another legally argued case was the *Manufacturing Clause* case²⁴⁰ concerning US legislation which operated as "an import prohibition against certain foreign-made books", which was clearly in breach of Article XI GATT (general elimination of quantitative restrictions). The panel findings in *FIRA*²⁴¹ and the *Manufacturing Clause*²⁴² case were seen as setting new standards of "quality in GATT dispute settlement proceedings",²⁴³ advancing further the role and quality of law in GATT dispute settlement.

Domestic law of the member states of the WTO increasingly came under the spotlight in the post 1982 litigation. The EC challenged internal U.S. law in two cases in 1986, the *Superfund* case,²⁴⁴ and the *Custom User Fee* case.²⁴⁵ The

²³⁷ Ibid. at page 166.

²³⁸ Op. cit. footnote no. 84.

²³⁹ Op. cit. footnote no. 16, at page 170 et seq.

²⁴⁰ *US - Manufacturing Clause*: Panel Report adopted on May 15/16, 1984. Parties EEC/US, BISD 31S/75.

²⁴¹ Op. cit. footnote no. 84.

²⁴² Op. cit. footnote no. 240.

²⁴³ Op. cit. footnote no. 16, at page 172.

²⁴⁴ Op. cit. footnote no. 86.

²⁴⁵ *US - Customs User Fee* Panel Report adopted on February 2, 1988, BISD 35S/245.

U.S. Superfund legislation²⁴⁶ provided for a "slightly higher tax rate for foreign petroleum" than for domestic petroleum, while the Customs User statute²⁴⁷ charged importers *ad valorem*, which resulted in importers of valuable items paying considerably more than the cost of the customs service rendered to them. Both cases would have required Congress to amend its legislation, something that USTR,²⁴⁸ the party defending these actions, would have found very difficult to guarantee. In the *Superfund* case the panel held that it was not the purpose of Article III of GATT to preserve competitive equality. Equally it held that violations of Article III GATT should not require "proof of cause-and-effect trade damage."²⁴⁹ The panel in the *Customs User Fee* case held that the customs user fee being imposed by the U.S. had to be a "uniform charge equal to the cost of the service".²⁵⁰ The panel ruled in the *Superfund* case that the parties should "take note of the statement by the United States that the penalty rate would in all probability never be applied,"²⁵¹ with the panel in the *Customs User Fee* case suggesting "that the Contracting Parties recommend that the United States bring the merchandise processing fee into conformity with its obligations under the General Agreement".²⁵²

The *Alcoholic Beverages (Canadian Liquor Board)* case,²⁵³ questioned the internal constitutional structure of Canada, whereby the federal states retained control over alcoholic beverages, and under which state trading companies had been set up, and acted to protect these enterprises.²⁵⁴ The Canadians were required to change these laws, a requirement which could have caused problems of a constitutional nature, had the Canada-U.S. Free Trade Agreement not been

²⁴⁶ Superfund Amendments and Reauthorization Act of 1986.

²⁴⁷ Omnibus Budget and Reconciliation Act of 1986 (OBRA) (Public Law 99-509), enacted pursuant to Section 13031(a) of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) (Public Law 99-272).

²⁴⁸ United States Trade Representative.

²⁴⁹ Op. cit. footnote no. 16, at page 211.

²⁵⁰ Ibid. at page 212.

²⁵¹ At paragraph 5.2.10 of the ruling.

²⁵² At paragraph 126 of the ruling.

²⁵³ *Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*. Panel Report adopted on March 22, 1988, BISD 35S/37.

²⁵⁴ Op. cit. footnote no. 16, at page 206.

recently agreed, which the federal government of Canada used as a method to give "European Community beverages the same treatment it had agreed to give United States beverages" in that agreement.²⁵⁵ The problems encountered by the US and Canada with regard to control of their legislation together with the issue of the legal relationship of GATT/WTO law with domestic legislation are problems with which the EC for its part has also had to grapple. These problems, in the context of the EC, will be revisited in chapter 6.

7. Post Uruguay Round Litigation

Jackson, referring to the Tokyo Round results stated that "the most striking characteristic is the balkanization or fragmentation of dispute settlement under the various Agreements".²⁵⁶ As a consequence USTR's documentation expressly made changes to the DSU "a principal goal of .. U.S. negotiations" during the Uruguay Round.²⁵⁷ Strengthening the dispute settlement process, the agreed changes included "1. time limits for each stage of the settlement process; 2. creation of an appellate body; 3. no requirement for consensus in the adoption of decisions; and 4. automatic authorization for countermeasures."²⁵⁸ This change in status for the DSU under the WTO was reflected in the change of style and tone of the panel and appellate body reports. One of the longest standing issues, the relationship between WTO/GATT law and national law was addressed when the provisions of s.301 of the US Trade Act 1974, long a thorn in the side of the dispute settlement process, and of many of the other participant countries of the WTO/GATT, became the subject matter of a panel report in 2000.

²⁵⁵ Ibid. at page 219.

²⁵⁶ Op. cit. footnote no. 55, at page 25.

²⁵⁷ Ford, Rosemary A; The Beef Hormone dispute and Carousel Sanctions: A Roundabout way of forcing compliance with World Trade Organisations Decisions Brook. J. Intl. L, Vol. XXVII:2 2002, at page 2, footnote no. 22, quoting from "Office of the U.S. Trade Representative, Executive Office of the President, the Uruguay Round Agreement Act, Statement of Administrative Action, Understanding on Rules and Procedures Governing the Settlement of Disputes" (Sep. 27, 1994), at 1994 WL 761797.

²⁵⁸ Ibid. at page 2, footnote no. 22.

7.1 United States - Sections 301 -310 of the Trade Act of 1974²⁵⁹

Section 301 of the US Trade Act had been highly controversial at an international level for many years. It altered the internal constitutional structure of the US by providing the executive with power which normally resided with Congress, giving the US President much more authority to negotiate international trade policy on behalf of the U.S.²⁶⁰ Congress for its part had been very unhappy with the GATT dispute procedures, with the President not originally being required by s.301 to refer a dispute to the GATT.²⁶¹ The 1979 amendment to s.301,²⁶² by way of insertion of a new s.303 did require USTR²⁶³ to "refer the matter to international dispute settlement procedures where applicable", but did not require those procedures to be "fully completed before the USTR" could "recommend action".²⁶⁴

S.301, originally, and as it evolved, was seen by the other contracting parties to GATT in a hostile light. The 1988 amendments,²⁶⁵ making the use of the s.301 procedures more "mandatory" with the discretion of the executive being "reduced in certain cases of "unjustifiable" actions ...by foreign governments"²⁶⁶ led, *inter alia*, to the EC protesting at the level of the Council, and releasing a press statement²⁶⁷ "expressing 'serious concern'" over the Act.²⁶⁸ The aggressive unilateralism exhibited by the U.S. pursuant to the provisions of s.301 is believed by many to have been "the catalyst for the movement to the new WTO dispute

²⁵⁹ Op. cit. footnote no. 112.

²⁶⁰ Jackson, John H., Davey, William J. & Sykes, Alan O. Jr.: *Legal Problems of International Economic Relations*, Cases, Materials and Text, West Group, St. Paul, Minn, 2002, at page 318.

²⁶¹ Op. cit. footnote no. 55, at page 70 et seq, referring to Comm. Rpt. No. 93-1298, Senate Finance Committee, 93rd Cong. 2nd Sess. (1974), reprinted in *US Code congressional and Administrative News*, vol. 4(1974), 7186, 7304.

²⁶² By way of the Trade Agreements Act of 1979.

²⁶³ The United States Trade Representatives, a branch of the Executive.

²⁶⁴ Op. cit. footnote no. 55, at page 70, at endnote no. 50.

²⁶⁵ By way of the Omnibus Trade and Competitiveness Act of 1988.

²⁶⁶ Op. cit. footnote no. 55, at page 71.

²⁶⁷ *European Community News*, No. 24/88.

²⁶⁸ Op. cit. footnote no. 55, at page 71, endnote no. 49.

resolution system".²⁶⁹ By 2000, however, the EC's concerns over the continuing existence of s.301 on the U.S. statute books led to the panel decision in the *s.301 panel* report, with the EC complaining that "by adopting, maintaining on its statute book and applying" these provisions of the Trade Act after the coming into force of the WTO, the US had "breached the historical deal that was struck in Marrakech".²⁷⁰

The *s.301* panel stated that the issue was "whether, on the correct interpretation of the specific WTO obligation at issue, only mandatory or also discretionary national laws are prohibited".²⁷¹ They further stated that if a member of the WTO reserves to itself, by way of national law, the right to do "something which it has promised not to do under Article 23.2(a.) DSU", this would go "against the ordinary meaning of Article 23.2(a) read together with Article 23.1" DSU.²⁷² The *s.301* panel expressly stated that the provisions of WTO law did produce indirect effect within the jurisdictions of its member states,²⁷³ as its subjects did not comprise nationals of member states as well as member states themselves, although individuals were still considered to be of "relevance to the GATT/WTO legal matrix".²⁷⁴ The panel recognised however,²⁷⁵ that the ongoing threat of a member state to act contrary to the provisions of Article 23 could of itself cause serious damage to the activity of the market place, producing "a 'chilling effect' causing serious damage in a variety of ways".²⁷⁶

The panel found²⁷⁷ that the drafting of s.304, "by mandating a determination before the adoption of DSB findings and statutorily reserving the right for this determination to be one of inconsistency" was "presumptively"

²⁶⁹ Op. cit. footnote no. 260, at page 318.

²⁷⁰ Ibid. at page 319.

²⁷¹ Ibid. at page 323.

²⁷² Ibid. at page 325.

²⁷³ For the ECJ's view as to the legal impact of GATT/WTO obligations within the EC see further chapter 6.

²⁷⁴ Op. cit. footnote no. 260, at page 326.

²⁷⁵ At point 7.88 of the panel report.

²⁷⁶ Op. cit. footnote no. 260, at page 328.

²⁷⁷ At paragraph 7.96 of the Panel Report.

inconsistent “with the provisions of Article 23.2(a)” of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.²⁷⁸ While the panel in this case expressly ruled out the possibility of finding, on this occasion, that WTO law has direct effect within the domestic jurisdictions of its member states, elements of the development of a doctrine of supremacy of WTO law over domestic law, at least with regard to the provisions of Article 23 DSU appear to be emerging. The US was saved the embarrassment of having to amend its legislation by virtue of the existence of a US Statement of Administrative Action (SSA). The panel found²⁷⁹ that matters pertaining to the WTO had been “carved out” of the “general application of the Trade Act” by as SSA, as the Trade Act discretion had thereby been limited, requiring section 301 determination of a breach of US rights “on the Panel or Appellate Body findings adopted by the DSB.”²⁸⁰ This “curtailment of the discretion” was found by the s.301 panel to be “lawful and effective”.²⁸¹

Section 301 of the Trade Act 1974 was further amended by section 407 of the Trade and Development Act of 2000.²⁸² This provided further teeth to section 301, by “permitting the U.S. to rotate the list of products targeted for tariffs every six months.”²⁸³ This addition to the US s.301 armoury led to a request for consultations by the EC,²⁸⁴ with the U.S. restraining from utilising the new provisions.²⁸⁵ It is clear that s.301 will continue to be problematic in the relationship between the U.S. and the WTO, with its EC counterpart, the Trade Barrier Regulation,²⁸⁶ with its less aggressive approach, being less controversial.²⁸⁷

²⁷⁸ Op. cit. footnote no. 260, at page 328.

²⁷⁹ At paragraph 7.109 of the panel report.

²⁸⁰ Op. cit. footnote no. 260, at page 330.

²⁸¹ Ibid. at page 330.

²⁸² Trade and Development Act of 2000, Pub. L. No. 106-299, s. 407, 11 Stat. 251, 293-94.

²⁸³ Op. cit. footnote no. 257, at page 2.

²⁸⁴ *United States - Section 306 of the Trade Act of 1974 and Amendments Thereto, Request for Consultations by the European Communities*, WT/DS200/1, Doc. No. 00-2304 (June 13, 2000).

²⁸⁵ Op. cit. footnote no. 257, at page 2.

²⁸⁶ Op. cit. footnote no. 116.

²⁸⁷ See further chapter 6 for an analysis of the EC’s Trade Barrier Regulation

7.2 Further legalisation of the dispute settlement process

The development of precedential value of panel and appellate body rulings has continued apace in the post- WTO structure.²⁸⁸ The interpretation of treaty texts in a strict legal manner has been emphasised in both the *Gasoline*²⁸⁹ case and the *Japan - Taxes on Alcoholic Beverages*²⁹⁰ reports.²⁹¹ The *Japan - Taxes on Alcoholic Beverages* Appellate Body report also led to the statement that "panels 'should' take into account previous adopted panel reports, which create 'legitimate expectations' concerning future dispute settlement outcomes".²⁹² This is leading, while not to legal certainty in an absolute sense, to greater legal certainty than under the GATT 1947 system.

The strengthening of legal process has also been evidenced in the post-Uruguay panel reports, starting with the pre-WTO case of *Tuna/Dolphin*, but was further developed in the *Desiccated Coconut*,²⁹³ and *Indian Patents*²⁹⁴ cases. *Desiccated Coconut* interpreted Article 7.2 DSU as imposing "a requirement that all claims that the complainant is making be in the first instance contained in its request for a panel."²⁹⁵ *Indian Patents* for its part held "that a party must specify the exact legal provision in a WTO agreement that it is relying on, in order for a claim related to that provision to be adjudicated, even if the claim itself has

²⁸⁸ Howse, Robert; *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law*, in Weiler, J.H.H.(ed.): *The Early Years of WTO Jurisprudence, The EC, the WTO and the NAFTA, Towards a Common Law of International Trade*, Oxford University Press, 2000, at page 60 et seq.

²⁸⁹ Appellate Body report on *United States - Standards for Reformulated and Conventional Gasoline* (WT/DS2/ AB/R), adopted on 20 May 1996 (*US-Gasoline*), p.18.

²⁹⁰ *Japan- Taxes on Alcoholic Beverages, Report of the Appellate Body*, WTDS8, 10-11/AB/R, 4 October 1996.

²⁹¹ Op. cit. footnote no. 288, at page 61.

²⁹² Ibid. at page 61.

²⁹³ *Brazil - Measures Affecting Desiccated Coconut*, Report of the Appellate Body, WT/DS22/AB/R, 21 February 1997.

²⁹⁴ *India - Patents Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the Appellate Body, WT/DS50/AB/R, 16 January 1998.

²⁹⁵ Op. cit. footnote no. 288, at page 45.

appeared in the Terms of Reference".²⁹⁶ Howse is of the view that the Appellate Body, in these two cases, "has clearly underscored the view of the DSU as embodying justiciable due process rights."²⁹⁷ The making of an objective assessment by a panel under Article 11 DSU is now a legal duty, with the Appellate Body interpreting "the DSU as establishing procedural disciplines" for the panels.²⁹⁸ The *Hormones*²⁹⁹ case held that the finding³⁰⁰ by a panel "of non-relevancy is itself a finding of law, subject to appellate review".³⁰¹ Similarly the Appellate Body in *Periodicals*³⁰² found that a breach of Article 11 DSU could arise where a panel mishandled or disregarded "evidence on the record", which of itself could "affect the sustainability of its legal conclusions upon appeal".³⁰³

The requirement for a panel, under Article 11 DSU, to make an "objective assessment of the facts of the case" is of particular relevance in the context of dealing with competing values, to include the non-trade values and interests protected by Article XX GATT. This point is of particular relevance in the context of agriculture, given the EC's view as to the multifunctionality of agriculture,³⁰⁴ together with the issue of sustainability of agricultural practices. Like issues had arisen in the GATT cases of *Tuna/Dolphin*³⁰⁵ and *Canadian Salmon and Herring*³⁰⁶ with little success. In *Tuna/Dolphin* the panel explicitly chose "simply to disregard evidence that related to the impact of the measures in dispute on non-trade values and interests".³⁰⁷ In *Canadian Salmon and Herring*³⁰⁸ a prohibition by Canada on the export of unprocessed salmon and herring,

²⁹⁶ Ibid. at page 45.

²⁹⁷ Ibid. at page 46.

²⁹⁸ Ibid. at page 46.

²⁹⁹ Op. cit. footnote no. 39, at para. 133.

³⁰⁰ At paragraph 143 of the report.

³⁰¹ Op. cit. footnote no. 288, at page 46.

³⁰² *Canada- Certain measures Concerning Periodicals*, Report of the Appellate Body, WT/DS31/AB/R, 30 June 1997, 22-3.

³⁰³ Op. cit. footnote no. 288, at page 46.

³⁰⁴ as discussed in chapter 2.

³⁰⁵ Op. cit. footnote no. 139.

³⁰⁶ *Canada - Measures affecting exports of Unprocessed Herring and Salmon* Panel Report adopted on March 22, 1988, BISD 35S/98.

³⁰⁷ Op. cit. footnote no. 288, at page 47.

³⁰⁸ Op. cit. footnote no. 306.

classified by the Canadians as part of a conservation program, was held to be a merely protectionist measure, and therefore GATT incompatible.³⁰⁹

The post-WTO 1998 *Shrimp/Turtle* Appellate Body ruling,³¹⁰ operating on the basis of a requirement under Article 11 DSU for an "objective assessment", which, read in conjunction with Articles 12 and 13 DSU, was obliged in the circumstances to take information from NGOs in certain circumstances, the Appellate Body thereby overruling the panel's report on this matter, and broadening the use of amicus curia briefs³¹¹ at the WTO.³¹² The issue of non-trade concerns was further examined by the Appellate Body in *Beef Hormones*,³¹³ referring to the "delicate and carefully negotiated balance... between these shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings."³¹⁴ It should also be noted that the Appellate Body in *Shrimp/Turtle*, in developing a WTO interpretation of the term "exhaustible natural resources", while not expressly referring to the Vienna Convention on the Law of Treaties, adopted the process set out therein, by prioritising "evolving international law" over the negotiating history of GATT 1947.³¹⁵ The Appellate Body, in *Shrimp-Turtle*³¹⁶ "extensively consulted agreements and context outside the WTO Agreement" with a view to interpreting the provisions of GATT 1994,³¹⁷ evidencing a development of breadth and depth in WTO/GATT jurisprudence. This approach to non-GATT/WTO international law has been evolving over time. In the pre-WTO *Thai Cigarette*³¹⁸ case the evidence

³⁰⁹ Op. cit. footnote no. 16, at page 218.

³¹⁰ At paragraph 106 of the ruling, cited op. cit. footnote no. 288, at page 50.

³¹¹ The issue of the use of amicus curiae briefs, at both the EC and WTO level, will be examined further in chapter 7.

³¹² Op. cit. footnote no. 288, at page 48.

³¹³ Op. cit. footnote no. 39.

³¹⁴ At para. 177 of the ruling, cited op. cit. footnote no. 288 at page 53.

³¹⁵ Op. cit. footnote no. 288, at page 56.

³¹⁶ Appellate Body in *US-Import prohibition of Certain Shrimp and Shrimp Products*, (*US-Shrimp*) WT/DS58/AB/R, adopted on 6 November 1998.

³¹⁷ Abbott, Frederick M.; North American Economic Integration: Implications for the WTO, the EU and Asia, chapter 3 in Francis Snyder ed.; *Regional and Global Regulation of International Trade* Hart Publishing, Oxford - Portland Oregon 2002-11-27, at page 89.

³¹⁸ *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, Report of the Panel, (1990) 37 BISD 200.

of the World Health Organization, pleaded by one of the parties, was ignored by the panel.³¹⁹ More recently however, the post-WTO *Beef Hormones*³²⁰ case stated that it was a panel's duty to make an "objective assessment", taking into consideration all relevant matters, but not to delegate "part of that duty to some other institution".³²¹

7.3 Post WTO Agricultural dispute resolution

The impact of the WTO Agreement on Agriculture on the post-WTO dispute resolution process was affected by the continuing existence of the Article 13 Agreement on Agriculture peace clause, which expired at the end of 2003. This should lead to a greater range of agricultural tariff concessions becoming subject to non-violation nullification or impairment actions.³²² An in depth analysis of the impact of the expiry of the peace clause will be made in chapter 7. An unsuccessful attempt was made to plead the Subsidies and Countervailing Measures (SCM) Agreement in the recent *EC-Export Subsidies on Sugar*³²³ case, with the Appellate Body declining "to complete the legal analysis" of the impact of the SCM Agreement on the case in light of the panel's failure adequately to address the issue. After a very interesting discussion as to whether the principle of estoppel formed part of WTO law, an issue which was left unresolved, and the operation of the principle of judicial economy, which since the *Canada – Wheat Exports and Grain Imports*³²⁴ Appellate Body ruling clearly does form part of WTO jurisprudence, the EC was found to be in violation of its obligations under the Agreement on Agriculture, by overpaying export subsidies on sugar.

The impact of the Article 20 Agreement on Agriculture's non-trade concerns will also be of interest for the future development of agricultural trade

³¹⁹ Op. cit. footnote no. 288, at page 63.

³²⁰ Op. cit. footnote no. 39.

³²¹ Op. cit. footnote no. 288, at page 64.

³²² Op. cit. footnote no. 327, at page 305 et seq.

³²³ Op. cit. footnote no. 201.

³²⁴ *Canada- Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004.

regulation. The Appellate Body ruling in *Beef Hormones*³²⁵ is worth noting in this context. This case concerned Article XI GATT and the SPS Agreement. The ruling of the panel, and to a certain extent the Appellate Body was to the effect that domestic measures which either "restrict trade by discriminating against imports", or operate to "prevent the access of imports into the national market (even if equally restricting domestic products)," will be reviewed by the WTO.³²⁶ In interpreting this case, Chambovey introduces the concept of *in dubio mitus*, whereby if there is ambiguity in interpreting a treaty, then that interpretation "which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties", is the one to be preferred.³²⁷ This would be in line with the view of the Appellate Body in *EC-Hormones*, when it stated that it could not be assumed that "sovereign states intended to impose the more onerous, rather than the less burdensome obligations".³²⁸ While this approach to treaty interpretation may lead to greater preservation of sovereignty of the member states of the WTO, it may prove to be an obstacle to the development of Article XX(b) exemptions to WTO provisions.

8. Remedies

In addition to giving a panel ruling on a particular measure, under Article 19 DSU both panels and Appellate Bodies are empowered to "suggest ways in which the Member concerned could implement the recommendations".³²⁹ This provision of the DSU has not been developed as, as stated by Mavrodis, "panel

³²⁵ Op. cit. footnote no. 39.

³²⁶ Poiares Maduro, Miguel: "The Constitution of the Global Market", Ch. 2 in Francis Snyder ed.; *Regional and global Regulation of International Trade* Hart Publishing, Oxford - Portland Oregon 2002-11-27, at page 54.

³²⁷ Chambovey, Didier; "How the Expiry of the Peace Clause (article 13 of the WTO Agreement on Agriculture) Might Alter Disciplines on Agricultural Subsidies in the WTO Framework, *Journal of World Trade* 36(2): 302-352, 2002, at page 310, footnote no. 22, at page 310, footnote no. 22.

³²⁸ Ibid. at page 310.

³²⁹ Article 19.1 DSU.

members and their Secretariat advisors normally seek to avoid making their ruling any more intrusive than necessary".³³⁰ A similar reluctance on the part of the panels to utilise the full powers of the DSU is reflected in the use of remedies. Remedies for WTO wrongs are, with the exception of some anti-dumping and countervailing duty cases, limited to "surveillance" and retaliation. Surveillance operates pursuant to Article 21 DSU in order to ensure implementation of adopted recommendations or rulings,³³¹ which are reviewed initially six months after the ruling, with the issue of compliance remaining "on the DSB's"³³² agenda until the issue is resolved".³³³ Article 22 DSU applies the remedies of "compensation and the suspension of concessions". This compensation should be voluntary, and "consistent with covered agreements" with the amount to be "mutually acceptable." Compensation was used in a number of antidumping and countervailing duty cases "in the late 80s and early 90s".³³⁴ This approach has encountered problems in the post-WTO regime,³³⁵ as the US, at s.129 of its Uruguay Round Agreement Act of 1994,³³⁶ provided that "'liquidated' entries would not be refunded even though the GATT- illegal duties could be revoked for all 'unliquidated' entries".³³⁷

Hudec is of the view that the lack of "compensation for past wrongs", a norm in domestic legal jurisdictions, reflects "a view of GATT law as having a lower status than domestic law" and the requirement for GATT legal obligations to be perceived as not having direct effect,³³⁸ GATT law being perceived as more

³³⁰ Hudec, Robert E.; Broadening the Scope of Remedies in WTO Dispute Settlement, quoting from Petros Mavroidis in his then unpublished chapter on Remedies in Mitsuo Matsushita, Petros C. Mavroidis & Thomas J. Schoenbaum, *The World Trade Organization Law, Practice, and Policy*, Oxford University Press, 2003, ISBN 0-19-876472-3, Ch. 19 in Friedl Weiss (ed.) *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the practice of Other International Courts & Tribunals* (Cameron May, London, 2000), at page 381.

³³¹ Article 21.6 DSU.

³³² Dispute Settlement Body.

³³³ Article 21.6 DSU.

³³⁴ Op. cit. footnote no. 330, at page 382.

³³⁵ Ibid. at page 385.

³³⁶ Section 129 of the Uruguay Round Agreements Act, 108 Stat. 4813, 4836, 19 U.S.C. 3501, 3538 (1994).

³³⁷ Op. cit. footnote no. 330, at page 385, footnote no. 32.

³³⁸ Ibid. at page 383.

a "diplomatic instrument" than a legal system.³³⁹ With the increasing development of the WTO as a legal system, the demand for monetary compensation may well return.

A further remedy is the Article 22 DSU Suspension of Concessions. While this option is open to all member states of the WTO, as pointed out by Hudec,³⁴⁰ economically, it is in reality only open in disputes with similar sized economies, or smaller economies. The asymmetry in power between the member states of the WTO, and the failing of the WTO in not being a rule based, rather than a rule oriented system is exposed by the fact that retaliation is not an option for disputes brought by developing countries against developed countries. This failure to provide a balance among the member states "can be viewed as a serious flaw in the basic structure of WTO legal remedies".³⁴¹ In addition, retaliation operates economically as a self inflicted harm on the member state retaliating.³⁴²

9. Conclusion

Despite the WTO's best efforts to develop an effective legal system, much popular dissatisfaction with its operation results from the fact that the WTO "only governs one aspect of globalisation in actuality",³⁴³ a matter outside its competence to resolve, while being held responsible for all aspects of globalisation. In addition many conflicts in world trade do not appear within the WTO framework.³⁴⁴ Access to justice is one of the problems of the DSU structure, with a modest attempt being made to redress the balance with the opening of the voluntarily funded independent legal advisory centre after the

³³⁹ Ibid. at page 383, et seq.

³⁴⁰ Ibid. at page 392, et seq.

³⁴¹ Ibid. at page 393.

³⁴² Ibid. at page 392.

³⁴³ Op. cit. footnote no. 2, at page 177.

³⁴⁴ Ibid. at page 197.

Seattle ministerial meeting.³⁴⁵ This will not, however, rebalance the asymmetries in power in the operation of the DSU, as only "few governments .. possess adequate institutional resources to tackle the complexities of the global trade issues".³⁴⁶ These, as outlined by Ladefoged Mortensen, include "extensive legal expertise, access to scientific resources, and permanent diplomatic representation".³⁴⁷ The WTO itself is not in a position to provide these for developing or least developed states, as the WTO has only "about 1.7% of the combined budget for the six international economic organisations",³⁴⁸ and is generally considered to be understaffed (at approx. 400 officials) and under-resourced,³⁴⁹ as reflected in the recent industrial disputes at the WTO. In addition, the lack of institutional autonomy³⁵⁰ within the WTO, and the lack of a tripartite division of power, between the legislative, executive and judiciary of the WTO, limits the progression of the WTO's development from a rule orientated system to a rule based system.³⁵¹

In addition to the above, new codes are also required to be elaborated, in particular to cover the issue of competition rules at a global level (known in the discourse as "Trade Related Anti-Trust Measures" or TRAMS). Both the OECD³⁵² and the UN³⁵³ have shown some leadership in this area, having developed preliminary codes and policy documents in this area,³⁵⁴ however these do not appear to be forthcoming in the Millennium round of negotiations.³⁵⁵ In addition the codes as currently designed also need to be revisited for their focus on trade, which according to Ladefoged Mortensen, has been "specifically

³⁴⁵ Ibid. at page 200 et seq.

³⁴⁶ Ibid. at page 203.

³⁴⁷ Ibid. at page 203 et seq.

³⁴⁸ Ibid. at page 197.

³⁴⁹ Ibid. at page 197.

³⁵⁰ Ibid. at page 198.

³⁵¹ A further analysis of the issue of governance and constitutionalism within the WTO will be conducted in chapter 7.

³⁵² See OECD, "Trade and Competition Policies- Exploring the Ways Forward", 1999, and OECD, "Trade and Competition Policies for Tomorrow", 1999 (Downloads from www.oecd.org).

³⁵³ UNCTAD Code on Restrictive Business Practices 1980.

³⁵⁴ Op. cit. footnote no. 2, at page 184, footnote no. 23.

³⁵⁵ Of which more in chapter 8.

designed to serve global corporate expansion and the harmonisation process" and contain no provision for curbing "certain harmful forms of corporate development, no matter what problems they bring".³⁵⁶

³⁵⁶ Op. cit. footnote no. 2, at page 177.

Chapter 6

WTO/GATT cases in the ECJ

1. Introduction

2. The issue of Direct Effect of GATT/WTO law within the EC legal system

2.1 Pre-WTO ECJ case law

2.2 Post-WTO ECJ case law

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3.1 The Article 133 procedure

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4. Relationship with member state legislation

4.1 A relationship with member states

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4.3 Issue of exclusive competence

4.4 The issue of subsidiarity

4.5 The political dimension

5. Conclusion

1. Introduction

Defining what is WTO law, which was examined in detail in chapters 4 and 5, and how EC law should interact with it, is quite problematic. The most likely candidate for comparison with WTO law would be international law; however, differences with International Law permeate the WTO legal order. Issues such as limited third party intervention and tight time schedules have been highlighted by Cottier.¹ Equally it has been noted that the rulings of the WTO Panels and Appellate Body, unlike those of the ICJ, may not be made by lawyers at all, but may be staffed by a mixture of lawyers, economists, or other professionals in order to provide a sufficiently wide range of experience in order to adequately deal with the “in-depth interdisciplinary discussions and assessments” of the issue at hand.² The distinction between a “rule-based” and a “rule-oriented system” discussed in detail in chapter 5, continues to pose a problem. With the increasing development of law at the WTO level, as evidenced by the line of GATT/WTO “caselaw” examined in chapter 5, legal consistency is now ensured through the input of the legal division of the secretariat, which “assists panellists to take account of precedents and doctrine” and to develop their draft findings in a WTO precedent compliant way.³ This development must, however, be understood against the backdrop of the constitutional structure of, and institutional balance within the WTO, which will be analysed in chapter 7.

It has been observed by legal academics that the law created and operated by the WTO, with the exception perhaps of the subject matter of the TRIPs Agreement,⁴ stands out from International law as operated by the ICJ in its approach to the rule of exhaustion of local remedies. The rule of exhaustion of

¹ Cottier, Thomas; *Dispute Settlement in the World Trade Organization: characteristics and structural implications for the European Union*, CMLRev. 35, 325-378, 1998, at page 342.

² Ibid. at page 349.

³ Ibid. at page 349.

⁴ The TRIPs Agreement makes extensive reference to domestic litigation and dispute resolution provisions that are required to be implemented and to be operated to protect intellectual property by the WTO member states.

local remedies, according to Kuijper,⁵ is well established at the ICJ, as evidenced by the *Interhandel* case,⁶ and the *ELSI* case.⁷ Furthermore, the ICJ has stated that “this principle of customary international law cannot be dispensed with by treaty partners by way of implication”,⁸ but dispense by way of implication appears to be exactly what has happened within the WTO, as only a provision within the WTO Anti-Dumping Agreement⁹ appears to address this issue, although perhaps not in a way that would satisfy the ICJ, should the provisions ever come before it.¹⁰ Kuijper advocates the maintenance of the rule of exhaustion of local remedies, as its strength would be the prevention of “endless inter-State conflict”.¹¹ Cottier, however, takes the contrary view, as he finds that such a rule would create great difficulties “in the pursuit of offensive trade interests”, in particular with regard to the operation of the EC’s Trade Barrier Regulation,¹² resulting, in all likelihood, in the end of the third track of the TBR,¹³ and the development of “time-consuming and costly”¹⁴ litigation within the domestic jurisdiction of fellow WTO member states. Cottier is firmly of the view that the dispute “should be settled as quickly as possible”, with GATT and WTO practice and procedure being “better equipped [than customary International law, as operated by the ICJ, and requiring the exhaustion of national remedies] to serve the needs of individuals and companies seeking redress”.¹⁵

It should perhaps be noted at this point that the TRIPs Agreement provides, at part III of the Agreement, that WTO member states should provide both civil and criminal remedies for breach of intellectual property rights,

⁵ Kuijper, Pieter Jan; *The New WTO Dispute Settlement System; the Impact on the European Community*, J. W.T. 1995, 29(6), 49- 71, at page 67.

⁶ *Switzerland v. the United States*, ICJ reports 1959, 6, at 27.

⁷ *ELSI* case, ICJ Reports, 1989, 15ff.

⁸ Op. cit. footnote no. 5, at page 66.

⁹ Articles 15(3) and Article 17(4) of the WTO Anti-Dumping Agreement.

¹⁰ Op. cit. footnote no. 5, at page 66 et seq.

¹¹ Ibid. at page 71.

¹² Op. cit. footnote no. 1, at page 342.

¹³ Whereby an EC member state request to Commission to initiate Article 1 procedures under Article 6 of Council Regulation (EC) 3286/94, (a route, it should be pointed out, which has never been used). See further the discussion later on in this chapter.

¹⁴ Op. cit. footnote no. 1, at page 342, footnote no. 49.

¹⁵ Ibid. at page 342.

specifying that, for civil remedies, that there should be fair and equitable procedures,¹⁶ rules of evidence,¹⁷ injunctions,¹⁸ provisions for awards of damages,¹⁹ together with other remedies.²⁰ In addition there should be a right to information²¹ and provisions for indemnification of the defendant in the case of abuse of enforcement procedures.²² The TRIPs provision on the criminal law sanctions which WTO member states have to provide, in the event of “wilful trademark counterfeiting or copyright piracy on a commercial sale” is less detailed.²³

Another factor which differentiates WTO law from International law is the legal status of the findings of the panel and appellate bodies. Unlike the findings of the ICJ, they are “not²⁴ judgments in their own right”, thereby differing from “courts of law proper”.²⁵ This state of affairs does not, however, weaken the system, but on the contrary, given that panel and Appellate Body reports then proceed through an endorsement and monitoring process by all the member states in the Dispute Settlement Body,²⁶ results in the panel findings have been given teeth, and therefore are “less likely to stay isolated and unimplemented in real life, as is frequently the case with traditional international adjudication”.²⁷ As with commercial arbitration processes, out-of-court settlements remain an option at the WTO.²⁸ Issues such as the development of standards for review may still have to be developed by the Appellate Body, but as pointed out by Cottier, in this regard the WTO is no different from many other legal systems,²⁹ and is “far removed”

¹⁶ Article 42 TRIPs.

¹⁷ Article 43 TRIPs.

¹⁸ Article 44 TRIPs.

¹⁹ Article 45 TRIPs.

²⁰ Article 46 TRIPs.

²¹ Article 47 TRIPs.

²² Article 48 TRIPs.

²³ Article 61 TRIPs.

²⁴ Except if parties agree to binding arbitration.

²⁵ *Op. cit.* footnote no. 1, at page 345.

²⁶ Articles 20 and 21 DSB.

²⁷ *Op. cit.* footnote no. 1, at page 346.

²⁸ *Ibid.* at page 347.

²⁹ *Ibid.* at page 350.

from the ECJ's traditional view of the GATT 1947 system of a mechanism for "conciliatory, non-judicial... diplomatic dispute settlement".³⁰

The EC Commission has reacted to the development of the WTO, and its "compulsory and binding" dispute settlement mechanism, by establishing a group of GATT specialist lawyers "within the external relations team of the legal service".³¹ This has been complemented by the announcement by both the Council and Commission that "they will scrupulously respect the criteria of WTO law in future agreements".³² The WTO has therefore already "exerted a preventative effect" on the internal workings of the EC, greater than was the case under GATT 1947.³³ Matters, such as free trade agreements and customs unions have, therefore to be WTO proofed, as evidenced in the recent ACP Cotonou Agreement,³⁴ as discussed in detail in chapter 3, with its predecessor, the Lomé agreement having been the subject matter of the series of cases commencing with the first *Bananas* case³⁵ at the WTO, and the EC's Euro-Med agreements having been the subject matter of the pre-WTO *Citrus* case.³⁶ In addition, and of particular interest in the context of this thesis, agriculture, pursuant to the WTO Agreement on Agriculture, has now been brought back into the regulatory and enforcement framework,³⁷ with the CAP being subject to the need to reform, as evidenced by its recent mid-term review,³⁸ although those reforms may yet have not gone far enough, given the recent *EC-Export Subsidies on Sugar*³⁹ case,⁴⁰

³⁰ Ibid. at page 350.

³¹ Op. cit. footnote no. 5, at page 60.

³² Op. cit. footnote no. 1, at page 363.

³³ Ibid. at page 363.

³⁴ 2000/483/EC: Partnership Agreement between the members of the African, Caribbean and Pacific Group of States (ACP) of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 [Official Journal L 317 15.12.2000].

³⁵ *European Communities - Regime for the Importation, Sale and Distribution of Bananas, complaints by Ecuador, Guatemala, Honduras, Mexico and the United States* (WT/DS 27).

³⁶ *European Communities - Tariff Preferences to Citrus Products of certain countries in the Mediterranean Region* (request for negotiations 8th August 1980, L5012).

³⁷ For a detailed discussion on how agriculture fell out of the GATT 1947 regulatory framework see chapter 4.

³⁸ Analysed further in chapter 8.

³⁹ *European Communities - Export subsidies on Sugar*, WT/DS265/29, WT/DS266/29, WT/DS283/10, 15th October 2004.

⁴⁰ Which is discussed in chapter 5.

particularly in light of the expiration of the WTO Agreement on Agriculture's peace clause.⁴¹ Issues at play in the minds of key decision makers would be the "particularly high" cost of WTO non-compliance, in light of the EC's "imperfect constitutional structures",⁴² with the likelihood of serious problems arising both domestically and internationally.⁴³ The loss of the veto mechanism within the WTO, and the development of the EC's Trade Barrier Regulation⁴⁴ also brings immediacy to WTO legal obligations.⁴⁵

2. The issue of Direct Effect of GATT/WTO law within the EC legal system.

2.1 Pre-WTO ECJ case law

As neither the WTO nor GATT is expressly referred to in the EC treaty,⁴⁶ the relationship between the two organisations, in the context of EC jurisprudence, has been developed by way of case law of the ECJ. The perception of the ECJ's changing personnel of the relationship between the evolving EC legal system and that of international law has evolved over the years. Article 302 EC⁴⁷ empowers the European Commission, to "maintain such relations as are appropriate with all international organisations".

European Law requires the EC to adhere to all of its international law commitments, with "the provisions of such an agreement" being deemed to form "an integral part of the Community system",⁴⁸ with an obligation being placed on

⁴¹ The potential impact of the expiration of the peace clause is analysed in chapter 7.

⁴² Which is analysed in chapter 7.

⁴³ Op. cit. footnote no. 1, at page 366.

⁴⁴ which is analysed later in this chapter.

⁴⁵ Op. cit. footnote no. 1, at page 357 et seq.

⁴⁶ Although reference is made to international reciprocal agreements under Article 310 EC, (Article 238 EC, pre Amsterdam).

⁴⁷ Article 229 EC, pre Amsterdam, which should be read in conjunction with Article 310 (ex Article 238 EC).

⁴⁸ Case 104/81 *Hauptzollamt Manz v. C.A. Kupferberg & Cie. K.G. a.A.* [1982] ECR 364, at paragraph 13.

the ECJ to ensure the “uniform application” of the terms of such agreements throughout the Community”⁴⁹ in order to ensure that they are not used to create barriers to trade. However, in the early case of *Hageman v. Belgium*,⁵⁰ the ECJ held that the provisions of the EEC – Greece Agreement of Association, prior to Greece becoming a full member of the then named EEC, had “no bearing” on the interpretation of an internal EEC Regulation.⁵¹ In the *Hauptzollamt Manz* case⁵² the ECJ found that compliance with the provisions of international legal agreements was “the responsibility of the Community institutions or of the Member States, and in the latter case, according to the effects in the internal legal order of each Member State which the law of that state assigns to international agreements concluded by it”, thereby recognising the dualist nature of the legal systems of some of the EC member states, but not elaborating on whether the EC legal system itself was to follow either the monist or dualist traditions with regard to its own obligations under International Treaties.

With regard to the GATT/WTO, ECJ jurisprudence recognises that the EC took on the external trade obligations of its member states, with regard to commitments under the GATT, as far back as on the 1st July 1968, when the EC introduced its Common Customs Tariff.⁵³ The ECJ has taken upon itself the role of interpreter of the GATT by way of preliminary ruling under Article 234 EC,⁵⁴ with regard to issues arising as and from that date, (1968).⁵⁵ A divergence in case law has however, emerged, between the ECJ GATT/WTO jurisprudence, and the ECJ jurisprudence dealing with other EC international agreements, with the

⁴⁹ Ibid. at paragraph 14.

⁵⁰ Case 181/73 *Hageman v. Belgium* [1974] ECR 449.

⁵¹ The provisions in question were Articles 41 and 43 of the Agreement of Association between the EEC and Greece, with the internal provision being Article 9(3) of Regulation (EEC) No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organisation of the market in wine, OJ L 99, 05/05/1970 p. 1, dealing with countervailing charges.

⁵² Op. cit. footnote no. 48, at paragraph 14.

⁵³ Joined Cases 267 - 269/81 *Annenistrasione delle Finanze dello Stato v. Societa Petrolifera Italiana SpA (SPI) and SpA Michelen Italiana (SAMI)* [1982] ECR 801.

⁵⁴ Article 177 EC, pre Amsterdam.

⁵⁵ Op. cit. footnote no. 53.

allegation being made that the court had not been “consistent in its approach”.⁵⁶ The ECJ itself had attributed this apparent difference in approach to the “certain asymmetry of obligations” in for example the Lomé Conventions, compared to those undertaken in the WTO/GATT agreements.⁵⁷

Following the GATT/WTO line of cases, in 1972 the ECJ recognised that the provisions of GATT 1947 were binding on the Community,⁵⁸ however the same case went on to say that on the issue of whether or not an EC provision is illegal because it is in breach of a public international law obligation, that it was necessary to establish; 1. that public international obligation is binding on the Community, and 2, where the proceedings are before a national court, that the rule would be self-executing.⁵⁹ Regard would also have to be had to the “spirit, the general scheme and the terms of the general agreement”.⁶⁰ In 1972 it was found that, because there was great flexibility in the earlier GATT, it was considered that the particular part of GATT in question at the time was not self-executing. By 1988⁶¹ the ECJ was prepared to refer to GATT 1947 documents for the purpose of interpreting a provision in EC legal provisions, where the EC legal provision appeared to facilitate this approach.⁶² The signing of the new WTO agreements in 1994 brought the issue of the legal relationship between the member states of the EC and the EC, and the legal relationship between the EC and the now to be formed WTO back before the learned judges of the ECJ in the guise of *Opinion 1/94*.⁶³ This Opinion addressed the issue of the competence of the EC in signing the various WTO agreements, of the then version of Article 113 EC, (renumbered Article 133 EC post Amsterdam, which has since been amended with the EC’s

⁵⁶ Rosas, Allan; Case Note; *Case C-149/96, Portugal v. Council*, CMLRev. 37: 797-816, 2000, at page 798.

⁵⁷ Ibid. at page 813.

⁵⁸ Cases 21 - 24 /72, *International Fruit Company N.V. and others v. Productschap Voor Groenten en fruit* [1972] ECR 1219 24 October 1973, at paragraph 18.

⁵⁹ Ibid. at paragraphs 7 and 8.

⁶⁰ Ibid. at paragraph 20.

⁶¹ Case 70/87 *Fediol v Commission* [1989] ECR 1781.

⁶² The point at issue here was a definition of subsidy, which was not expressly defined in Article 3 of Regulation No. 2176/84, but reference was made in the Regulation to provisions of Article XVI of GATT 1947.

⁶³ *Opinion 1/94 (re WTO Agreement)* [1994] ECR I-5267

competence being substantially extended by the ratification of the Treaty of Nice),⁶⁴ but did not address the issue of what was to be the legal effect of those WTO agreements within the EC legal jurisdiction. This issue was left to be addressed by further cases before the ECJ in the post-WTO era.⁶⁵

2.2 Post-WTO ECJ case law

The post-WTO ECJ case law on the legal relationship between WTO law and internal EC law is epitomised in the tensions and findings of Case C-149/96 *Portugal v. Council*.⁶⁶ Two doctrines of interpretation had been carried forward from the pre-WTO ECJ case law, those of *Fediol*⁶⁷ and *Nakajima*.⁶⁸ The *Nakajima* doctrine, from the 1991 judgment,⁶⁹ built upon the cases of *Hauptzollamt Mainz*⁷⁰ and *SIOT*,⁷¹ which held that the Community was “under an obligation to ensure compliance with the GATT 1947 and its implementing measures”,⁷² with the EC regulation in question in this case having been adopted “in order to comply with the international obligations of the Community”,⁷³ thereby becoming subject to judicial review for compliance with, in this case, Articles 2(4) and (6) of the GATT Anti-Dumping Code.⁷⁴

The *Fediol* doctrine⁷⁵ built upon the findings, of, *inter alia*, *International Fruit Company*,⁷⁶ that “GATT provisions were not capable of conferring on

⁶⁴ *Opinion 1/94* will be discussed further in the context of the GATS and TRIPs Agreement in chapter 8.

⁶⁵ For a further analysis of the findings of *Opinion 1/94* please refer to chapter 3.

⁶⁶ Case C-149/96: *Portuguese Republic v Council of the European Union*, [1999] ECR I-8396, at paragraph 49.

⁶⁷ *Op. cit.* footnote no. 61.

⁶⁸ Case C-69/89 *Nakajima All Precision v Council* [1991] ECR I-2069.

⁶⁹ *Ibid.*

⁷⁰ *Op. cit.* footnote no. 48.

⁷¹ Case 266/81 *SIOT v. Ministero delle Finanze and Others* [1983] ECR 731.

⁷² *Op. cit.* footnote no. 68, at paragraph 31 of the judgment.

⁷³ *Ibid.* at paragraph 31.

⁷⁴ *Ibid.* at paragraph 32 of the judgment.

⁷⁵ *Op. cit.* footnote no. 61.

⁷⁶ *Op. cit.* footnote no. 58.

citizens of the Community rights which they can invoke before the courts”,⁷⁷ given the “broad flexibility of its provisions, especially those concerning deviations from general rules, measures which may be taken in cases of exceptional difficulty, and the settling of differences between the contracting parties”.⁷⁸ The ECJ in *Fediol* also relied on the *Kupferberg* judgment,⁷⁹ which held that the fact that parties to an international agreement had set up their own institutional mechanism for “consultations and negotiations inter se in relation to the implementation of the agreement” did not “exclude all judicial application of that agreement”.⁸⁰ Building on these foundations, the ECJ, in *Fediol*, found that the ECJ was not prevented “from interpreting and applying the rules of GATT with reference to a given case, in order to establish whether certain specific commercial practices should be considered incompatible with those rules,”⁸¹ and that the fact that the regulation in question,⁸² entitled “economic agents .. to rely on the GATT provisions .. in order to establish the illicit nature of the commercial practices which they consider to have harmed them” and that said economic agents were “entitled to request the Court to exercise its powers of review over the legality of the Commission’s decision applying those provisions”.⁸³

In the 1994 judgment of *Federal Republic of Germany v. Council of the European Union*,⁸⁴ a case concerning the banana protocol,⁸⁵ the ECJ, building on the *Fediol* and *Nakajima* doctrines, held, that while “the provisions of GATT have the effect of binding the Community”,⁸⁶ given the great flexibility of the

⁷⁷ Op. cit. footnote no. 61, at paragraph 19 of the judgment.

⁷⁸ Op. cit. footnote no. 61, at paragraph 20 of the judgment.

⁷⁹ Op. cit. footnote no. 48.

⁸⁰ Op. cit. footnote no. 61, at paragraph 21 of the judgment.

⁸¹ Ibid. at paragraph 20 of the judgment.

⁸² Council Regulation 2641/84, OJ 1984, L 252/1.

⁸³ Op. cit. footnote no. 61, at paragraph 22 of the judgment. .

⁸⁴ Case C-280/93 *Federal Republic of Germany v Council of the European Union* [1994] ECR I-4973.

⁸⁵ Protocol annexed to the Implementing Convention on the Association of the Overseas Countries and Territories with the Community, pursuant to the then Article 136 EC, the current version of which is now Article 187 EC.

⁸⁶ Op. cit. footnote no. 84 at paragraph 105 of the judgment.

provisions of GATT,⁸⁷ and the fact that GATT itself does not provide that its rules are to be unconditional, “an obligation to recognize them as rules of international law which are directly applicable in the domestic legal systems of the contracting parties cannot be based on the spirit, general scheme or terms of GATT”.⁸⁸ Even Germany, as a member state of both the EC and the WTO was not in a position to invoke the provisions of GATT 1947 in the ECJ. The Court concluded that in such circumstances, “it is only if the Community intended to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly refers to specific provisions of GATT” that the ECJ could “review the lawfulness of the Community act in question from the point of view of the GATT rules”.⁸⁹

By the time that the judgment in *Portugal v. Council*,⁹⁰ was delivered by the ECJ the thinking of the ECJ had evolved, and GATT 1947 had been substituted by the WTO package of agreements, amongst them GATT 1994 and the WTO Agreement on Agriculture. Building on the ruling in *Germany v. Council*,⁹¹ the ECJ recognised that, “in conformity with the principles of public international law” the EC was free to conclude an agreement with a non-EC member state, which could be made to have effect within the “internal legal order of the contracting parties”,⁹² and that it was only in the absence of such an express agreement that the ECJ would have to determine what legal effect, if any, such an agreement would have within the EC legal jurisdiction.⁹³ Under international law, it was recognised by the ECJ, that there was an obligation for “bona fide performance of every agreement”; however, this of itself did not determine what legal effect that international agreement would have within the domestic jurisdiction of the contracting parties.⁹⁴ The ECJ recognised the difference

⁸⁷ Ibid. at paragraph 106 of the judgment.

⁸⁸ Ibid. at paragraph 110 of the judgment.

⁸⁹ Ibid. at paragraph 111 of the judgment.

⁹⁰ Op. cit. footnote no. 66.

⁹¹ Op. cit. footnote no. 84.

⁹² Op. cit. footnote no. 66 at paragraph 34.

⁹³ Relying on Case 104/81 *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641, paragraph 17.

⁹⁴ Op. cit. footnote no. 66, at paragraph 35.

between the WTO treaty texts and the earlier GATT 1947 Agreement, particularly with regard to the dispute settlement mechanism. The ECJ was of the view that the continuing emphasis on negotiation between the parties to the WTO agreements mitigated against the WTO agreements by themselves having any impact on the internal legal operation of the EC. Any greater emphasis being put on the WTO agreements, other than legal documents in international law, would, in the view of the ECJ, “have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 (DSU)of entering into negotiated arrangements even on a temporary basis”.⁹⁵ The Court went on to say, referring back to the *Fediol* and *Nakajima* rulings, that it was “only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules”.⁹⁶ As pointed out by Zonnekeyn, “the fundamental changes in the GATT system have not induced the ECJ to depart from its former case law as regards the status of GATT in the EC legal order”.⁹⁷ This approach in *Portuguese Textiles* was followed in a 2001 judgment on the TRIPs Agreement.⁹⁸ (The interaction of the TRIPs Agreement with EC provisions on intellectual property in the context of agriculture will be examined in chapter 8).

The finding of the ECJ in the *Portuguese Textiles* case, above, is in line with the thinking of the WTO panels on this matter, as reflected in the WTO panel ruling in *United States – Sections 301-310 of the Trade Act of 1974*.⁹⁹ This

⁹⁵ Ibid. at paragraph 40 of the judgment.

⁹⁶ Ibid. at paragraph 49 of the judgment.

⁹⁷ Zonnekeyn, Geert A.; “The Status of WTO Law in the EC Legal Order; The Final Curtain?” J.W.T. 34(3): 111-125, 2000, at page 111.

⁹⁸ Case C-89/99 *Schieving-Nijstad vof and Others v Robert Groeneveld*, [2001] ECR page I-05851, at paragraph 55.

⁹⁹ *United States - Section 301-310 of the Trade Act of 1974*, WT/DS152/R Panel Report adopted by the DSB on January 27, 2000, at para. 7.72.

panel,¹⁰⁰ ruling on US law, referring to the doctrine of direct effect, stated at paragraph 7.72 of its ruling, that “neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect”. Following this approach, the GATT/WTO did not create a new legal order “the subjects of which comprise both contracting parties or members and their nationals.”¹⁰¹ However, as pointed out by Zonnekeyn, the panel report does have an interesting aside in a footnote,¹⁰² to the effect that the issue of whether WTO agreements would “create rights for individuals” which national courts would have to protect, “remains an open question, in particular in respect of obligations following the exhaustion of DSU procedures in a specific dispute”.¹⁰³ In addition, the panel reserved the right to the WTO to “construe any obligations as having direct effect”, and that in the absence of such construction, member states of the WTO were not precluded from, “following internal constitutional principles,” finding that some obligations “give right[s] to individuals”.¹⁰⁴

A very strong line of dissenting academic opinion has developed to this case law, inspired by the opinion of AG Saggio, in the *Portuguese Textiles* case, and followed up and elaborated upon by a variety of academics. Snyder,¹⁰⁵ for his part has highlighted opinion of AG Jacobs in *Netherlands v. European Parliament and Council*,¹⁰⁶ the “importance of negotiation and reciprocity in GATT/WTO dispute settlement”, a “political view” given that the Advocate General was taking into consideration issues outwith the confines of his own, the EC’s, legal system. Reliance was made on the “reciprocal character of the WTO Agreements”, with the WTO being seen as a “forum for negotiations”, which

¹⁰⁰ Also discussed in chapter 5 in the context of the development of law under GATT 1947.

¹⁰¹ Op. cit. footnote no. 97, at page 112, footnote no. 7.

¹⁰² Footnote no. 661.

¹⁰³ Op. cit. footnote no. 97, at page 124, quoting the panel in *United States – Sections 301 310 of the Trade Act of 1974*.

¹⁰⁴ Ibid. at page 124.

¹⁰⁵ Snyder, Francis; *The Gatekeepers: The European courts and WTO law*, CMLRev 40; 313-367, 2003.

¹⁰⁶ Case C-377/98, *Netherlands v. European Parliament and Council*, [2000] ECR I-6229, at para 147 of the opinion.

some commentators referred to as being “anachronistic,”¹⁰⁷ but which other commentators took as being fair comment, with Ehlermann warning against unduly tying the “hands of the Community negotiators”.¹⁰⁸ For his part Rosas warned against the ECJ “depriving the legislative and executive bodies of the Community of the margins of manoeuvre which is enjoyed by the similar bodies of the trading partners”.¹⁰⁹

Concern had been expressed by some academics that if the ECJ were to give direct effect within the EC legal system to WTO law, then if the EC’s WTO trade partners were not implementing WTO rules, how would the EC be able to react if some sort of legality control was recognised within the EC. AG Saggio had addressed this issue in *Portuguese Textiles* to the effect that such “non-compliance would be sufficient reason for the non-application of the WTO Agreements by the EC courts and would” in the event of recognition of WTO law within the EC legal system, “leave no possibility for Member States and individuals to invoke their provisions directly”.¹¹⁰ Saggio utilised Article 41 of the Vienna Convention on the Law of Treaties in support of his argument, which provided that parties “to a multilateral agreement are authorized, within certain limits, to derogate by a bilateral agreement from the application *inter se* of the provisions of the multilateral agreement”.¹¹¹ However, if the Vienna Convention is to be pleaded in support of the case, then according to Petersmann, under Articles 26 and 27 of the 1969 Vienna Convention on the Law of Treaties, and under Articles 300 and 307 EC, then WTO obligations should “take legal primacy over secondary EC law”.¹¹²

¹⁰⁷ Op. cit. footnote no. 97, at page 121.

¹⁰⁸ Ibid. at page 121.

¹⁰⁹ Op. cit. footnote no. 56, at page 807.

¹¹⁰ Op. cit. footnote no. 97, at page 116.

¹¹¹ Op. cit. footnote no. 56, at page 805.

¹¹² Petersmann, Ernst-Ulrich; *Alternative Dispute Resolution - Lessons for the WTO*, Ch. 2 in Friedl Weiss (ed.) *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the practice of Other International Courts & Tribunals* (Cameron May, London, 2000), at page 37.

The issue of the non-reciprocity of direct effect, initially raised by AG Tesouro in the *Hermès* case,¹¹³ was also addressed by AG Saggio, to the effect that principles of customary international law could be used to lead to either “the non-application or even extinction of WTO agreements”.¹¹⁴ In a convoluted argument, which perhaps negated his argument for legality control, AG Saggio argued that “the WTO dispute settlement rules are not capable of limiting the competency of the ECJ”.¹¹⁵ He further went on to say that WTO panels were not “judicial bodies”, but rather “conciliatory mechanism[s] for the settlement of disputes”¹¹⁶ of a more political nature. This, however, did not prevent the ECJ, within the EC legal jurisdiction from “going further”, and “thus from annulling Community acts as being considered contrary to the WTO”.¹¹⁷ Why the ECJ would choose to go further is however a moot point. It has also been pointed out that the compensation mechanism written into the DSU “cannot prevent the WTO Agreements being invoked in a direct legal proceeding” at an EC level.¹¹⁸ In addition the “compensation mechanism” does not give a right to a party to “violate a legal obligation” under the WTO agreements, but “merely constitutes a practical option to temporarily defuse a dispute between WTO members who are parties to a dispute.”¹¹⁹

The ECJ has emphasised, in rejecting direct effect and allied arguments, with regard to the effect of WTO law within the EC legal system, the importance of negotiation between parties to a dispute under Article 22(2) DSU, if there has been a failure “to implement the recommendations and decisions of the Dispute Settlement Body within a reasonable period of time”.¹²⁰ Therefore, the argument goes, that if the ECJ imposed upon the EC, and its member states, direct effect,

¹¹³ Case C-53/96 *Hermès International/ FHT Marketing Choice BV*, [1998] ECR I-3603, at paragraph 33 et seq.

¹¹⁴ Desmedt, Axel; “European Court of Justice on the Effect of the “WTO Agreements in the EC Legal Order”, LIEI, 2000 27(1), 93 –101, at page 97.

¹¹⁵ Op. cit footnote no. 97 at page 114, referring to paragraph 23 of the opinion.

¹¹⁶ Ibid at page 114.

¹¹⁷ Ibid at page 115.

¹¹⁸ Ibid. at page 123.

¹¹⁹ Ibid. at page 123 et seq.

¹²⁰ Ibid. at page 118.

that would “deprive the legislative and executive bodies of WTO Members of the possibility to search, even on a temporary basis, for negotiated solutions,”¹²¹ thereby depriving “the legislative or executive organs of the Community of the scope of manoeuvre enjoyed by similar organs of the EC’s major trading partners.”¹²² Rosas has, in particular, highlighted the issue of the lack of democratic accountability of WTO bodies, and argued that “granting direct effect to WTO rules” would play into the hands of the likes of anti-globalisation protestors”, and “could instead deprive the democratic institutions of the EU and other WTO members of the margin of manoeuvre they currently possess so as to strike a balance between trade and societal values.”¹²³

Others have raised concern about the possibility that, if direct effect of WTO rules was granted within the EC legal system, compensation could then be granted to individuals and legal bodies in the event that member states or the EC passed law not in compliance with WTO rules, and that that situation had to be avoided. As Desmedt has observed, that line of argument avoids dealing with the current “odd situation” in which the EC’s trading partners would be able to claim compensation through the DSU for a breach of WTO rules by the EC, but that “any claim based on the violation in question by a subject in the EC would be rejected”.¹²⁴ For Desmedt this situation is particularly odd as it “deprives these agreements, as well as Article 300(7) EC Treaty of much of their meaning for EC citizens.”¹²⁵ Despite this reasoning, as indicated by the panel report in *United States – Sections 301-310 of the Trade Act of 1974*,¹²⁶ and by EC law academic commentators, it is still possible to “envisage giving direct effect to rulings of the dispute settlement bodies as adopted by the DSB.”¹²⁷

¹²¹ Op. cit. footnote no. 56, page 806 et seq.

¹²² Op. cit. footnote no. 97, at page 118.

¹²³ Op. cit. footnote no. 56, at page 816.

¹²⁴ Op. cit. footnote no. 114, at page 100.

¹²⁵ Ibid. at page 100.

¹²⁶ Op. cit. footnote no. 99, at para. 7.72.

¹²⁷ Op. cit. footnote no. 56, at page 811.

2.3 Legality control

Despite the fact that the ECJ had held that GATT provisions did not have direct effect on the EC given their great flexibility, in *Federal Republic of Germany v. Council of the European Union*,¹²⁸ AG Saggio, in *Portuguese Textiles* did not argue for the direct effect of the WTO agreements, even though their provisions were less flexible than equivalent GATT provisions, but was of the view that the lack of direct effect “should not affect the legal effect of these Agreements in the EC legal order”.¹²⁹ As Desmedt has pointed out, the AG “clarified the often blurred distinction between direct effect and legality control”.¹³⁰ In Zonnekeyn’s view, the great “novelty of the *Portuguese Textiles* case” was the development of the legality control debate,¹³¹ with the dispute settlement mechanism being implicitly recognised as being essentially governed “by politics rather than by the rule of law”.¹³² Under this “legality control” approach, an “international agreement can serve as a norm for legality control even if the agreement does not have direct effect”, with any view to the contrary limiting the scope of Article 300(7) EC,¹³³ which provides that “Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States”.¹³⁴ AG Saggio sidelined the issue of the preamble to Council Decision 94/800,¹³⁵ which provides that the WTO agreements were not to be deemed to have direct effect, stating that it was “for the court to determine whether or not the WTO agreements” would have direct effect.¹³⁶

¹²⁸ Op. cit. footnote no. 84.

¹²⁹ Op. cit. footnote no. 97, at page 116.

¹³⁰ Op. cit. footnote no. 114, at page 95.

¹³¹ Op. cit. footnote no. 97, at page 119.

¹³² Ibid. at page 120.

¹³³ Ex Article 228 EC.

¹³⁴ Op. cit. footnote no. 114, at page 96.

¹³⁵ Council Decision 94/800, Official Journal L 336, 23/12/1994 p. 1

¹³⁶ Op. cit. footnote no. 114, at page 96.

The ECJ, in its reasoning in the *Portuguese Textiles* case, implied “that legal control of acts adopted by the Community institutions on the basis of WTO law” would not be possible as the ECJ must preserve for the EC legislator the freedom necessary “in order not to endanger the EC’s future negotiating position towards its trading partners in the WTO”.¹³⁷ Zonnekeyn sees this as not being a legal argument, but rather a political one, being “an obvious assault to the ‘trias politic’ principle,¹³⁸ which ought to be the cornerstone of every legal system”.¹³⁹ The view therefore being adopted was that the “absence of direct effect of an international agreement protected the validity of Community acts”.¹⁴⁰

2.4 Accommodation and Acculturation

In the absence of either direct effect or legality control, academic commentators have been examining the ECJ’s line of judgments for indirect effect principles, in particular Rosas, who interprets indirect effect in this context as being “an obligation for domestic courts to *interpret* national law in the light of WTO law.”¹⁴¹ This principle of consistent interpretation has been developed from the *Hermès*¹⁴² case, and the *International Dairy Agreement* case,¹⁴³ but as Zonnekeyn has said, it would only be a “valuable substitute for direct effect” but not for legality control,¹⁴⁴ with Desmedt advocating this approach as developing into possibly “the most effective method for parties to invoke WTO rules”.¹⁴⁵ While it is undoubtedly true, as Snyder has said, that the European courts often “use WTO law as an aid in interpreting a range of EC legal instruments”,¹⁴⁶ particularly with regard to “foreign trade, notably imports, agriculture, anti-

¹³⁷ Op. cit. footnote no. 97, at page 121.

¹³⁸ For a further discussion on this issue, see chapter 7.

¹³⁹ Op. cit. footnote no. 97, at page 121.

¹⁴⁰ Ibid. at page 120.

¹⁴¹ Op. cit. footnote no. 56, at page 814.

¹⁴² Op. cit. footnote no. 113.

¹⁴³ Case C-61/94 *Commission v. Germany* [1996] ECR I-3989. The agreement, the International Dairy Arrangement 1979, formed part of the conclusions of the GATT Tokyo Round.

¹⁴⁴ Op. cit. footnote no. 97, at page 125.

¹⁴⁵ Op. cit. footnote no. 114, at page 101.

¹⁴⁶ Op. cit. footnote no. 105, at page 320.

dumping and intellectual property”,¹⁴⁷ it would perhaps be overstating the case to say that there is currently an obligation on the EC courts to interpret EC law in “light of WTO law”.¹⁴⁸ As Snyder goes on to say “direct effect is not the only way of creating relations between sites of governance”.¹⁴⁹ It might perhaps be more accurate to describe the reaction of the ECJ to WTO law is as a process of “accommodation”, with the ECJ not feeling itself obliged to follow WTO law, but is, where possible, prepared to accommodate the principles and provisions of the WTO regime within its own jurisprudence.

The relationship between the WTO and the EC legal systems is not however restricted to the interpretations of the ECJ. While the ECJ has “been most in the public eye” in this regard, “other EC institutions also interpret WTO (law) regularly in their work”,¹⁵⁰ in particular, the European Commission, through its “right of initiative to propose EC legislation”.¹⁵¹ Using the terminology of the cultural anthropologist, the term “acculturation” could be utilised to describe the influence of WTO law on EC law outwith the operation of the ECJ. Acculturation has been used by colonial applied anthropologists, in the context of European colonisation, “to describe the changes in tribal culture” in the context of the minimisation of “the role of coercion and the loss of tribal autonomy.”¹⁵² While there has been no conquest of European legal culture by the WTO, there has been a voluntary engagement by the EC legal system with the emerging WTO legal system, with consequent changes in the legal and institutional “tribal” culture at an EC level. This view is reinforced by Snyder who states that “WTO law has profound implications for the EU constitution”, having “already begun to reshape relations between (the) EC and (its) Member States”.¹⁵³ It has as a result of the development of the practices of “clear reference,

¹⁴⁷ Ibid. at page 320.

¹⁴⁸ Op. cit. footnote no. 56, at page 814.

¹⁴⁹ Op. cit. footnote no. 105, at page 362.

¹⁵⁰ Ibid. at page 317.

¹⁵¹ Ibid. at page 319.

¹⁵² Bodley John H.; *Cultural Anthropology; Tribes, States and the Global System*, Mayfield Publishing Company, California, 1994, at page 295.

¹⁵³ Op. cit. footnote no. 105, at page 367.

transposition and consistent interpretation” of WTO law within the EC legal system resulted in “institutional growth and expansion, fostered policy integration and reinforced the development of a legal culture oriented to multi-site governance”.¹⁵⁴ It is therefore possible to describe the legal relationship between the WTO and the EC, covering both the intra- and extra – ECJ points of contacts as being a relationship of accommodation and acculturation.

2.5 Trends in the International Case law

From the case law of various contracting parties to GATT 1947 around the world, there appears to be the development of a trend in the GATT/ WTO jurisprudence in other jurisdictions, which may match, to a certain extent, the developments of approach within the ECJ in the same period. It would appear that there was a movement from initially viewing GATT 1947 as either having, or having the potential to have, direct effect, but as GATT and the WTO laws become more complex and profound, to a retreat from this initial position, to the development of a conclusion that perhaps the WTO legal regime may not have direct effect after all in domestic jurisdictions.

At the GATT panel level, the issue of the direct effect of GATT 1947 provisions arose in the panel report of *United States: Alcoholic and malt beverages*,¹⁵⁵ which held that “Article XXIV:12 was not applicable to the United States”. The panel was convinced, on the basis of the writing of Jackson and Hudec, that “GATT law had become part of US federal law, and since federal law, according to the US Constitution, is supreme over state law, any inconsistent state law had to give way before GATT”.¹⁵⁶ The issue of a federal state being responsible for the actions of its constituent states is confirmed by Article 22(9) of the DSU, which in the absence of control being enforced by the federal

¹⁵⁴ Ibid. at page 367.

¹⁵⁵ *United States: Alcoholic and malt beverages*, BISD 39S/206, para. 5.78 – 5.80. at page 206. Adopted 19 June 1992.

¹⁵⁶ Op. cit. footnote no. 5, at page 70.

government on the sub-national government, imposes “compensation and suspension of concessions” provisions on the federal state.¹⁵⁷ To the astonishment of Kuijper,¹⁵⁸ the US has managed, through its implementing legislation and its accompanying statement of administrative action, to reduce “itself to the same situation as the EC” by expressly “limiting the supremacy of federal law over state law”, and thereby managing largely to “undo the consequences of” the adopted panel report in *United States- Alcoholic and malt beverages*.¹⁵⁹ The current situation is that the US federal government can only force a state government to comply with WTO provisions by way of the federal government taking a court action “comparable to action pursuant to Article 169 of the EC Treaty” (now Article 226 EC) against the state concerned.¹⁶⁰ It should also be noted that the WTO agreements now contain “an elaborate mechanism for consultation with state authorities with a view to guaranteeing that state law is in conformity with the WTO Agreement and its Annexes”.¹⁶¹

On the other side of the Pacific Ocean, in Japan, Iwasawa, in his writings,¹⁶² refers to two domestic Japanese cases which addressed the issue of the direct applicability of GATT 1947 in Japan, namely the *Kolbe Jewellery* case¹⁶³ and the later *Kyoto Neckties* case.¹⁶⁴ Under Japanese law “treaties are accorded a high authority”, overriding statutes, even those subsequently enacted, under Article 98(2) of the Japanese Constitution.¹⁶⁵ Following this approach, the

¹⁵⁷ Ibid. at page 70.

¹⁵⁸ Ibid. at page 69 et seq.

¹⁵⁹ Op. cit. footnote no. 155, at para. 5.78 – 5.80.

¹⁶⁰ Op. cit. footnote no. 5, at page 70.

¹⁶¹ Ibid. at page 70.

¹⁶² Iwasawa, Yuji; Implementation of International Trade Agreements in Japan, in Hilf, Meinhard and Petersmann, Ernst-Ulrich (eds.), *National Constitutions and International Economic Law*, Kluwer 1993, ISBN 90 6544 665 6, at page 299 et seq.

¹⁶³ *Kolbe Jewellery*: the relevant judgment was that of May 30, 1966, Kolbe District Court, 3 *Kakeishū* 519, 524 - 25.

¹⁶⁴ *Kyoto Neckties* case: The relevant judgment here was the Judgment of June 29, 1984, Kyoto District court, 31 *Shōmu Geppō* 207, which seems to have been endorsed by the Judgment of Feb. 6, 1990, Supreme Court, slip op.

¹⁶⁵ Article 98 of the Japanese Constitution provides as follows: This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity. 2) The treaties concluded by Japan and established laws of nations shall be faithfully observed.

courts in the *Kolbe Jewellery* case suggested that GATT 1947 had direct effect within Japan. The later *Kyoto Neckties* case caused uproar in Japanese legal academic circles when the Kyoto District court's judgment, "apparently denying the direct applicability of the GATT" was endorsed by the Japanese Supreme Court in 1990, a "poorly reasoned case" according to Iwasawa, and another academic, Professor Matsushita claiming that the courts in *Kyoto Neckties* seemed "to ignore Article 98(2) of the constitution",¹⁶⁶ a strange claim to lay at the feet of any Supreme Court, leading to the possible conclusion that the decision was taken for unexpressed politically pragmatic, or accommodation reasons, along the lines taken by the ECJ in the later (1999) *Portuguese Textiles* case.¹⁶⁷

An interesting line of GATT jurisprudence can be seen within the EC, on the issue of the direct effect of GATT 1947 within the Italian jurisdiction. During the latter part of the 1960's the Italian lower and appeal courts had ruled that "Article III, para. 2 of GATT conferred on private parties a right to invoke it before the courts,"¹⁶⁸ leading to the Italian state being ordered to reimburse GATT illegal taxes levied on importers. When the ECJ was holding that the EC had been substituted for the Member States with regard to commitments under the GATT from the 1st July 1968, with the introduction of the Common Customs Tariff,¹⁶⁹ the Italian Corte di Cassazione was upholding, in 1968, the findings of its lower courts with regard to Article III, para. 2 of GATT.¹⁷⁰ Since that finding, however, the impact of the ruling had "progressively lost significance in practice",¹⁷¹ with

¹⁶⁶ Op. cit. footnote no. 162, at page 310 et seq.

¹⁶⁷ Op. cit. footnote no. 66.

¹⁶⁸ Mastellone, Carlo; Case Report on Case 266/81, *SIOT (Società Italiana per l'Oleodotto Transalpino) s.p.a. v. Ministero delle Finanze, Ministero della Marina Mercantile, Circonscrizione doganale di Trieste, Ente autonomo del porto di Trieste*. Preliminary Ruling of 16 March 1983. requested by the Italian Corte di Cassazione, and Joined Cases 267-269/81, *Amministrazione delle Finanze dello Stato v. S.P.I. (Società Petrolifera Italiana) s.p.a.*(267/81) and *Amministrazione delle Finanze dello Stato v. S.A.M.I (S.p.a. Michelin Italiana)* (268-269/81). Preliminary ruling of 16 March 1983 requested by the Italian Corte di Cassazione, 20 CML Rev. 1983, pages 559-580, at page 568

¹⁶⁹ Op. cit. footnote no. 53.

¹⁷⁰ Judgment No. 2293, 6 July 1968, *Ministero delle Finanze v. Cotonificio Valle Ticino s.p.a., Foro Italiano* 1968, I. 2462; Giust. Civ. 1968, I, 1571; Riv. dir. int, 1969, 328; Dir. Scambi int. 1968, 504.

¹⁷¹ Op. cit. footnote no. 168, at page 569.

the Italian courts beginning to reverse their position on GATT 1947 in subsequent cases. During the 1970's, while the ECJ was holding that in *International Fruit*¹⁷² that GATT 1947 was binding on the Community, the Italian courts were "developing the concept" that GATT 1947 had direct effect, and that "specific provisions may be considered as self-executing" in light of their particular content, independent of other provisions of the agreement, and regardless of "elements such as the absence of a jurisdiction for the settlement of disputes".¹⁷³ The Italian courts were aware that the ECJ had taken a different line on this issue, with the Corte di Cassazione stating that, in comparison to the ECJ line, its view was wider than that of the ECJ, and also recognising that different member states of the EC might take different positions on the legal effect of GATT 1947, holding that "GATT could not be considered [a Community act] under [the then] Article 177".¹⁷⁴ By the time, however, of the *SIOT* and *SAMI* references to the ECJ in 1983, by the Corte di Cassazione, the Italian judiciary were following the ECJ's line on the legal status of the GATT 1947, thereby reversing earlier Italian case law on the matter.

2.6 More recent cases

The issue of the legal relationship between the EC and the WTO has arisen again in the more recent cases, all dealing with bananas, of *Atlanta*¹⁷⁵ and, what have become known as the "March 2001" judgments, of *Cordis*,¹⁷⁶ *Bocchi Food*¹⁷⁷ and *T.Port*.¹⁷⁸ The *Atlanta* case was heard at the CFI, and an appeal made to the ECJ, where the issue of the relationship between the EC and the WTO was

¹⁷² Op. cit. footnote no. 58.

¹⁷³ Op. cit. footnote no. 168, at page 571.

¹⁷⁴ Ibid. at page 566.

¹⁷⁵ Case C-104/97P. *Atlanta AG v. European Community*, [1999] ECR I-6983, [2001] 1 CMLR 20.

¹⁷⁶ Case T-18/99, *Cordis Obst und Gemuse Großhandel GmbH v Commission of the European Communities*, [2001] ECR page II-00913.

¹⁷⁷ Case T-30/99, *Bocchi Food Trade International GmbH v Commission of the European Communities*, [2001] ECR page II-00943.

¹⁷⁸ Case T-52/99, *T. Port GmbH & Co. KG v Commission of the European Communities*, [2001] ECR page II-00981.

argued. The ECJ, in its judgment, confined itself to procedural issues, and did not address directly the substantive issue of the relationship between the EC and the WTO, as the plea on this matter was not included in the original appeal documentation, and therefore deemed inadmissible. The Advocate General, did address the issue at paragraphs 3 to 32 of his opinion. The “March 2001” judgments were all heard at the CFI level. Only *T.Port* was appealed to the ECJ,¹⁷⁹ but on appeal the ECJ only addressed the issue of the CFI’s calculation of reference quantities.

In the *Atlanta* case at the ECJ protection of legitimate expectations was pleaded. While the Advocate General recognised that this was “one of the fundamental principles of the Community”, as the Community retained a discretion as to its running of its common markets “traders had no legitimate expectation that an existing situation which the Community institutions could alter in the exercise of their discretionary powers would be maintained”.¹⁸⁰ Further, the claim for non-contractual liability of the Community under Article 215 EC, required “proof of illegal conduct, damage and a causal link”,¹⁸¹ with, in the AG Mischo’s view, the claimants falling at the first hurdle, proof of illegal conduct. The claim in this case was not that the EC provisions dealing with the common organisation of bananas were in breach of the “substantive GATT provisions or those of the WTO”, but rather that, in light of the findings at the WTO in *EC-Bananas*,¹⁸² on the issue of the EC banana regime, the EC provisions were now illegal. The claimant therefore pleaded that the “legislative provisions [were] applied to the appellant in disregard of the binding effect on the Community of the decision of the WTO Dispute Settlement Body”.¹⁸³ The AG stated that this plea was inadmissible as it had not been entered in the original

¹⁷⁹ Ibid.

¹⁸⁰ At paragraph H8 of the judgement in Case C-104/97P. *Atlanta AG v. European Community*, [1999] ECR I-6983, [2001] 1 CMLR 20.

¹⁸¹ At paragraph H9 of the judgement in Case C-104/97P. *Atlanta AG v. European Community*, [1999] ECR I-6983, [2001] 1 CMLR 20.

¹⁸² *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R, 9 September 1997.

¹⁸³ At point A19 of the AG’s opinion.

appeal documentation from the CFI. However, utilising the common law technique of an *obiter dicta*, the AG stated that in any event, following the case of *Commission v. Germany*,¹⁸⁴ the appellant could “not profitably set up the incompatibility of Regulation 404/93 with the WTO Agreement to contest the reasoning of the Court of First Instance.”¹⁸⁵ Going even further down the *obiter dicta* line, the AG stated that even the claim that EC law was in conflict with a decision of the Dispute Settlement Body, “would not assist the appellant’s case”,¹⁸⁶ on the basis that even a ruling of the Appellate Body of the DSU does not “impose on the party whose legislation is found to be contrary to the WTO provisions a duty immediately to amend that legislation”.¹⁸⁷ The AG went on to say that “Clearly... the rights which a decision of the Appellate Body would intend to confer on individuals have nowhere near the scope which the appellant seeks to give them”.¹⁸⁸ This is particularly in light of the fact that, as pointed out by Zonnekeyn, “Article 22 of the DSU gives WTO members the possibility of maintaining the unlawful measures in place beyond the reasonable period of time if the parties to the dispute have agreed on a suitable compensation.”¹⁸⁹

In the *Cordis* case,¹⁹⁰ which was heard by the CFI, it was reiterated that “the WTO Agreement and its annexes are not intended to confer rights on individuals which they could rely on in court”,¹⁹¹ nor could the Community incur “non-contractual liability as a result of infringement of them”.¹⁹² The position in *Portugal v. Council*,¹⁹³ that, despite the significant differences between GATT 1947 and the WTO Agreement they both “nevertheless accord considerable importance to negotiation between the parties”¹⁹⁴ was reaffirmed. The issue of the

¹⁸⁴ Op. cit. footnote no. 84.

¹⁸⁵ At paragraph A23 of the report.

¹⁸⁶ At paragraph A24 of the report.

¹⁸⁷ At paragraph A27 of the report.

¹⁸⁸ At paragraph A30 of the report.

¹⁸⁹ Op. cit. footnote no. 97, at page 122.

¹⁹⁰ Op. cit. footnote no. 176.

¹⁹¹ At paragraph 46 of the judgment.

¹⁹² At paragraph 51 of the judgment.

¹⁹³ Op. cit. footnote no. 66.

¹⁹⁴ At paragraph 47 of the judgment.

possibility of an imbalance of obligations between member states of the WTO, should the ECJ take any other line, was also addressed. The CFI also reaffirmed the ECJ's line in *Portugal v. Council*¹⁹⁵ that the Community judicature could not "deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by" the Community's trading partners within the WTO.¹⁹⁶ The argument was made in this case that there should be developed a "new category of misuse of powers" to the extent that the Commission adopted a regulation in breach of WTO obligations. This was rejected outright. It is established case law of the ECJ that misuse of powers can only be claimed if legislation is "adopted with the exclusive or main purpose of achieving an end other than that stated",¹⁹⁷ but such an allegation was not being made, or could not be made, by the applicants in the *Cordis* case.¹⁹⁸ The claim that a new category of misuse of powers should be developed was therefore rejected. The CFI reaffirmed that, following *Portugal v. Council*,¹⁹⁹ the ECJ or CFI was only required to "review the legality of" a provision of EC law "in the light of WTO law", when, either, 1. "the Community intends to implement a particular" WTO obligation, or 2. if a piece of EC law "refers expressly to the precise provisions of the agreements contained in the annexes to the WTO Agreement".²⁰⁰ As neither the WTO panel report (22 May 1997),²⁰¹ nor the Appellate Body report (9th September 1997)²⁰² "included any special obligations which the Commission intended to implement, within the meaning of the case-law,"²⁰³ in Regulation no. 2362/98",²⁰⁴ then no such a claim could made in this case.

¹⁹⁵ Op. cit. footnote no. 66.

¹⁹⁶ At paragraph 49 of the judgment.

¹⁹⁷ At paragraph 53 of the judgment, following Case C-285/94 *Italy v. Commission*, [1997] ECR I-3519.

¹⁹⁸ Op. cit. footnote no. 176.

¹⁹⁹ Op. cit. footnote no. 66.

²⁰⁰ At paragraph 58 of the judgment.

²⁰¹ Op. cit. footnote no. 35.

²⁰² Op. cit. footnote no. 182.

²⁰³ Specifically Case C-69/89, *Nakajima v. Council*, [1991] ECR I-2069.

²⁰⁴ Paragraph no. 59 of the judgment.

In *Bocchi Foods*²⁰⁵ the arguments and the findings of the CFI followed closely those of the *Cordis* case. The *T.Port*²⁰⁶ CFI case followed closely both the arguments and findings of *Bocchi Foods* and *Cordis*, with the CFI stating that “it should be noted that it is clear from Community case-law that the WTO Agreement and its annexes are not intended to confer rights on individuals which they could rely on in court”.²⁰⁷ The CFI restated the position in *Portugal v. Council* by saying that “it is only where the Community intends to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the agreements contained in the annexes to the WTO Agreement” that it became subject to either ECJ or CFI review “in the light of the WTO rules”.²⁰⁸

With reference to the March 2001 judgments, Peers is of the view²⁰⁹ that the CFI was in error in concluding that the “implementation exceptions” could be “deduced from previous case law”. Peers argues that while previous case law certainly did clarify the position with regard to the 1993 Regulation dealing with bananas, “it had not ruled on the applicability of those exceptions to subsequent amendments of the Regulation”. He advocates that it is “strongly arguable” that the purpose of the 1998 Council Regulation was “related to a WTO obligation”,²¹⁰ pointing out the reference within the preamble to the regulation of the WTO commitments. Further the explanatory memorandum accompanying the regulation referred to the need to bring EC law in line with WTO law, and that a “system of import licences compatible with the WTO should be introduced”.²¹¹ In light of this persuasive argument, it is hard to ignore Peers’ view that it is difficult to distinguish between a measure “being adopted “in order to comply” with the

²⁰⁵ Op. cit. footnote no. 177.

²⁰⁶ Op. cit. footnote no. 178.

²⁰⁷ At paragraph 46 of the judgment.

²⁰⁸ At paragraph no 58 of the judgment.

²⁰⁹ Peers, Steve: WTO dispute settlement and Community Law, (2001) 26 ELRev, 605, at page 609.

²¹⁰ Ibid. at page 609.

²¹¹ Ibid. at page 610 et seq.

WTO ruling”, as the 1998 regulation clearly is, and a measure “intending to implement a WTO obligation”.²¹²

Two further cases worth examining in this context are the *Biret* case²¹³ and the *Van Parys* case.²¹⁴ The *Biret* case²¹⁵ raised the issue of the impact of a DSB ruling on the non-compliance of EC law with WTO law and the possibility of the development of “no-fault liability for the Community in respect of its normative acts”. Both of these issues were rejected at the CFI hearing with the CFI finding that “the purpose of the WTO agreements is to govern relations between States for economic integration... and not to protect individuals”.²¹⁶ The CFI reaffirmed the findings in *Portugal v. Council*, following the *Fediol*²¹⁷ and *Nakajima*²¹⁸ hypothesis, and found that the facts of the *Biret* case did not fall within the two exceptions to WTO law not having direct effect in EC law. It further found that the ruling of the DSB did not alter the EC’s law in this area, finding that a ruling of the DSB would only become relevant if the Court had found that the agreement in question, in this instance the SPS agreement, had direct effect, which was not the finding of the CFI in this case.

Biret’s claim that the CFI should develop “its case-law in the direction of a system of no-fault liability for the Community in respect of its normative acts”²¹⁹ was also rejected on the basis that this plea was introduced late in the proceedings and should have formed part of the original pleadings in this case. Problems also arose with the pleadings on appeal, so that the effect of the DSB ruling was not properly ruled on by the ECJ. The ECJ did however state that it, the ECJ, had to take into consideration the period of time given by the WTO to

²¹² Ibid. at page 611.

²¹³ Cases C-93/02, and C-94/02, *Biret International SA v. Council of the European Union*, [2003] ECR I-10497.

²¹⁴ Case C-377/02, *Leon Van Parys NV v Belgisch Interventie- en Restitutiebureau (BIRB)*, [2005] ECR I-01465.

²¹⁵ Op. cit. footnote no. 213.

²¹⁶ At paragraph 72 of the judgment.

²¹⁷ Op. cit. footnote no. 61.

²¹⁸ Op. cit. footnote no. 68.

²¹⁹ At paragraph 70 of the judgment.

the EC to amend its laws, and any examination of liability of EC institutions for the non-amendment of laws within that time period would “render ineffective the grant of a reasonable period for compliance” with the DSB ruling.²²⁰ The ECJ therefore found that no damage could be proven to have occurred after the “reasonable period for compliance”, so it did not have to rule further on the matter. It also avoided ruling on the second plea, “concerning the Community’s alleged no fault liability”²²¹ as it had been submitted too late to be considered.

The opinion of AG Alber in the ECJ case does however cast a different light on the issues raised in *Biret*. At paragraph 83 of his opinion, he states that a ruling of the DSB removes the margin of manoeuvre of WTO contracting parties, with the obligation being to implement the findings of the DSB immediately and without condition. This, therefore, alters the nature of the obligation of the WTO member states, as there is, after a DSB ruling, an “obligation sufficiently clear and precise”. He did recognise, however, that there was a need for a Community legislative measure to put in place the provisions of the legislative changes in this situation.²²² He went on to say that, from the point of view of Community law, the right of the free exercise of economic activities would be in favour of the recognition of direct effect of the rulings of the DSB, after the expiration of a reasonable delay for amending EC law.²²³ In such a situation Alber is also of the opinion that there would be a case for recognising the possibility of bringing a case for compensation for EC non-compliance with WTO law.²²⁴

The above points highlight some problematic issues from a legal perspective, which resolve themselves with relative clarity when examined from a political perspective. The response of the ECJ follows what appears to be political reasoning rather than pure legal reasoning, as to the legal effect of WTO law within the EC jurisdiction. It gives rise to a question as to the exact balance of

²²⁰ At paragraph 65 of the judgment.

²²¹ At paragraph 69 of the judgment.

²²² At paragraph 89 of the opinion.

²²³ At paragraph 110 of the opinion.

²²⁴ At paragraph 112 of the opinion.

powers between the EC and its member states in the context of the EC's relationship with the WTO and, in this context, the relative role of the EC institutions within the EC jurisdiction and the role that the ECJ has developed for itself within the EC. While the EC is clearly set up to run on the basis of the rule of law, the issue does arise whether the ECJ should ignore the "unanimous position of the Governments" of the EC *vis à vis* the WTO.²²⁵ As stated in one Common Market Law Review editorial, the balance is between the ECJ acceding to governments' demands pursuant to pressure "from weak industries defending their own short term interests" or should the ECJ protect the interests of EC consumers and the EC's own interests by "granting direct effect of" what were then GATT 1947 obligations "against the wishes of the Governments".²²⁶ As pointed out in the same editorial, "the Court cannot govern Europe",²²⁷ despite the highly political role that it has been asked to play in the context of the legal relationship between the EC jurisdiction and the WTO jurisdiction. This would reflect the discourse in chapter 7, to the effect that the ECJ is unable to govern Europe on its own,²²⁸ with Zonnekeyn referring²²⁹ to "an obvious assault to the *trias politic*" principle".²³⁰

The *Van Parys* case,²³¹ following the *Biret* case, was therefore key in discovering possible future ECJ jurisprudential developments in this area. The *Van Parys* case, perhaps given the need for a clear statement on this matter, was heard in Grand Chamber by the ECJ. The question posed, as stated by the ECJ²³² was whether the Commission, in adopting tariff quotas which breached the EC's WTO commitments, in light of the "avowed intention" to reform the EC's "regime for the importation of bananas into the Community" in order to conform with its WTO obligations, exceeded its authority. The ECJ pointed out,

²²⁵ Editorial Comment; Strengthening GATT, CMLRev. 1983 page 393, at page 395.

²²⁶ Ibid. at page 396.

²²⁷ Ibid. at page 396.

²²⁸ Ibid. at page 396.

²²⁹ And which was referred to in chapter 5.

²³⁰ Op. cit. footnote no. 97, at page 121.

²³¹ Op. cit. footnote no. 214.

²³² At paragraph 4 of the judgment

reaffirming *Portugal v. Council*,²³³ that “the WTO agreements are not in principle among the rules” to be used for the purpose of ECJ judicial review of EC secondary legislation.²³⁴ The ECJ reaffirmed the *Fediol*²³⁵ and *Nakajima*²³⁶ rulings,²³⁷ stating that even when the DSB had held that domestic measures were in breach of WTO rules, the “WTO dispute settlement system nevertheless accords considerable importance to negotiation between the parties”,²³⁸ given that compensation or “the application of concessions or the enforcement of other obligations” were substitutable remedies on an interim basis to the withdrawal of the non-WTO compliant domestic measures.²³⁹ Reaffirming the politically pragmatic argument above, the ECJ stated that giving direct effect to either WTO agreements or DSB rulings would deprive “the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of that memorandum of reaffirming a negotiated settlement, even on a temporary basis.”²⁴⁰ If the ECJ took this line, then this discretion, which fellow WTO members would benefit from, would be denied to the EC institutions. Therefore the Grand Chamber of the ECJ held that, in the circumstances of this case, that it was not possible for a party to plead before the ECJ that Community law was in breach of WTO law.²⁴¹

3. Access to the WTO dispute settlement system from the EC

Given the above line of ECJ caselaw on the impact of WTO law within the EC legal system, the question which must be posed is can individuals, either natural or legal, interact in any way with the WTO. As discussed in chapter 5 the US business community interacted with the WTO legal framework through s.301

²³³ Op. cit. footnote no. 66.

²³⁴ At paragraph 39 of the judgment.

²³⁵ Op. cit. footnote no. 61.

²³⁶ Op. cit. footnote no. 68.

²³⁷ At paragraph 40 of the judgment.

²³⁸ At paragraph 42 of the judgment.

²³⁹ At paragraph 43 of the judgment.

²⁴⁰ At paragraph 48 of the judgment.

²⁴¹ At paragraph 54 of the judgment.

of the Trade Act 1974. On this side of the Atlantic, one political mechanism, the Article 133, formerly the Article 113 procedure, and one legal mechanism, the Trade Barrier Regulation,²⁴² are available.

3.1 The Article 133 procedure

Most cases brought by the EC to the WTO or GATT panels arose by virtue of Commission instigation, either of its own volition, or through an informal complaint process, from either a member state of the EC, or from industry. Initially the case would have been examined by the GATT division of what was once referred to as DG1, but since 1992 by “a special team of GATT lawyers in the Legal Service”.²⁴³ The 133 Committee, formerly known as the 113 Committee, a “Council committee which advises the Commission on the conduct of the common commercial policy,”²⁴⁴ would then decide on whether to proceed with the dispute at the WTO/GATT level, by way of requesting “the constitution of a panel” after the carrying out of the “necessary formal consultations under Article XXIII GATT” or equivalent code.²⁴⁵ Political pragmatism pervades decision making at this level, with a high level of cooperation between the institutions. The issue of which institution would take precedence over the other in the case of an Article 133 action has never arisen. The case would then be presented by the WTO specialists in the EC’s legal service, “in close collaboration with the competent Commission department”,²⁴⁶ with input at times from relevant EC member states or industries.

²⁴² Council Regulation 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community’s rights under international trade rules, in particular those established under the auspices of the World Trade Organization”, OJ L 349/71 of 31 December 1994, amended by Council Regulation 356/95, OJ L 41/3 of 23 February 1995.

²⁴³ Op. cit. footnote no. 5, at page 54.

²⁴⁴ Ibid at page 55, footnote no. 23.

²⁴⁵ Ibid. at page 55.

²⁴⁶ Ibid. at page 55.

3.2 The New Commercial Policy Instrument

The precursor to the current Trade Barrier Regulation (TBR) was the New Commercial Policy Instrument (NCPI). The NCPI's development was inspired by US developments in this area. The issue of the interaction of member states' legal systems with GATT arose with the development of the US's development of a "new procedure in US trade law" section 252 of the Trade Expansion Act of 1962.²⁴⁷ The European Commission responded by proposing, in the early 1960's "a Community mechanism to respond to foreign unfair trade practices".²⁴⁸ While these early developments did not have an impact on the development of the GATT, with no proceedings ever getting to hearing under the US's 1962 act, and the European Commission's proposals for a similar measure not being adopted,²⁴⁹ they paved the way for future developments in this area by both jurisdictions. Section 301 proceedings were introduced into the US legal system, under the Trade Act in 1974, with private parties now availing of the complaint procedure, with their rights, along with those of the executive "to take action against foreign unfair trade practices" having been strengthened.²⁵⁰ In addition, the US authorities were prepared, controversially, to utilise the s.301 procedure "to ignore GATT obligations and take aggressive action to protect US interests".²⁵¹ Despite Community complaints, the US "continued to refine and sharpen Section 301"²⁵² in its 1979 and 1984 legislation.²⁵³

As a consequence the EC developed the "New Commercial Policy Instrument" (NCPI),²⁵⁴ which operated from 1984 to 1994, when it was amended by Regulation (EC) No. 522/94,²⁵⁵ but was subsequently amended and replaced

²⁴⁷ Bronckers, Marco C.e.J.; Private Participation in the Enforcement of WTO Law: the New EC Trade Barriers Regulation CMLRev. 33: 299-318, at page 300.

²⁴⁸ Ibid. at page 300.

²⁴⁹ Ibid. at page 301.

²⁵⁰ Ibid. at page 301.

²⁵¹ Ibid. at page 301.

²⁵² For a fuller discussion of s.301 of the US Trade Act 1974 see Chapter 5.

²⁵³ Op. cit. footnote no. 247, at page 301.

²⁵⁴ Op. cit. footnote no. 82.

²⁵⁵ Regulation (EC) No. 522/94 of 7 March 1994, OJ L 66/10.

by the Trade Barrier Regulation (TBR),²⁵⁶ “which formed part of the overall Uruguay Round implementation package”.²⁵⁷ The Commission, in drafting the proposal for the NCPI was careful to ensure that the EC continued to operate within its international legal commitments, thereby avoiding some of the controversy being garnered by the US’s s.301 procedure, with reliance being made on the “threat of GATT-authorized retaliation”.²⁵⁸ Such authorisation for retaliation was exercised once under GATT 1947, when the Netherlands was authorised to retaliate against the US when restrictions were imposed on dairy products.²⁵⁹ According to Kuijper,²⁶⁰ this route gave rise to few “fully fledged GATT panel” complaints, with the exception of the AKZO complaint, which developed into the panel report *U.S. – Section 337 of the Tariff Act of 1930*.²⁶¹

The NCPI provided for two methods of activation, one by way of EC member states complaints, and the other by way of “private complaints representing a European industry”.²⁶² Member States did not utilise the first method, preferring the more direct Article 113 mechanism, as it then was. The private complaint mechanism, during its ten years of existence, saw the Commission formally considering seven complaints, of which five resulted in further investigations.²⁶³ As the NCPI permitted “private complaints to rely on GATT principles” it was therefore subject to judicial review,²⁶⁴ such a review of the Commission’s decision not to pursue an NCPI investigation being made in the *Fediol* case,²⁶⁵ with the ECJ reviewing and upholding the Commission’s decision

²⁵⁶ Op. cit. footnote no. 240.

²⁵⁷ Op. cit. footnote no. 5, at page 55, footnote no. 25.

²⁵⁸ Op. cit. footnote no. 247, at page 317.

²⁵⁹ Ibid. at page 317, at footnote no. 69.

²⁶⁰ Op. cit. footnote no. 5, at page 55.

²⁶¹ *US - Section 337 of the Tariff Act of 1930* Panel Report adopted on November 7, 1989, BISD 36S/345.

²⁶² Op. cit. footnote no. 247, at page 302.

²⁶³ Ibid. at page 302, et seq.

²⁶⁴ Ibid. at page 314.

²⁶⁵ Op. cit. footnote no. 61.

to reject the complaint, thereby creating an important precedent, not only for the NCPI, but also for the current TBR.²⁶⁶

3.3 Trade Barrier Regulation²⁶⁷

The EC's Trade Barrier Regulation, the successor to the pre-WTO New Commercial Policy Instrument and drafted to cover both goods and services,²⁶⁸ entered into force, pursuant to the Uruguay Round legislative reform, in January 1995, together with a revised basic antidumping and countervailing duty regulation. Unlike the anti-dumping regulation, the TBR is "not designed to implement third countries' obligations under specific WTO agreements".²⁶⁹ In addition, the TBR was designed to "overcome the weaknesses" of the NCPI, "through improved concepts that correspond better to the features of the new multilateral rules".²⁷⁰ In line with the policy adopted by the EC for the NCPI, and unlike its US counterpart, the s.301 mechanism, first, the TBR operates entirely within the framework of international legal obligations, second, it is not used as a mechanism for further opening up of third party markets beyond commitments already given in WTO treaty texts, and third, retaliatory measures cannot be imposed unless international dispute settlement had been followed.²⁷¹ The approach adopted by the EC, as set out by Van Eeckhaute, is a) "better co-ordination and pooling of information within the Commission in order to tackle the barriers more effectively", and b) putting more emphasis on the role of business and enterprises, encouraging them to be more pro-active in bringing forward complaints and providing information.²⁷² Both the substance of the complaints and the procedures to be followed in the TBR have "several notable

²⁶⁶ Van Eeckhaute, Jean Charles; Private Complaints against Foreign Unfair Trade Practices, JWT 33(6) 199-213, 1999, at page 207.

²⁶⁷ Op. cit. footnote no. 242.

²⁶⁸ Sundberg, Drew and Vermulst, Edwin: The EC Trade Barriers Regulation An Obstacle to Trade? JWT 35(5): 989-1013, at page 989.

²⁶⁹ Op. cit. footnote no. 266, at page 199.

²⁷⁰ Ibid. at page 200.

²⁷¹ Ibid. at page 208.

²⁷² Ibid. at page 200.

changes” from the NCPI.²⁷³ The TBR, in comparison to the NCPI, is also considered to be more focused in its application, with possibly fewer complaints being admitted under it, than under the previous regime.²⁷⁴

While its provisions are not identical, the TBR is drafted in order to match the complaints being brought with the right to a cause of action under the WTO agreements, the key test being “obstacle to trade”, with the intention that the TBR would be used to “enforce the Community’s existing rights under internationally agreed rules”.²⁷⁵ The TBR is considered to be the “organic link” between EC mechanisms and the WTO, being an important addition to the trigger mechanism to activate the WTO dispute settlement mechanism,²⁷⁶ with both, in WTO terms, violation and non-violation complaints being covered.²⁷⁷

There are four requirements to activate the TBR; “(i) the trade practice in question must constitute an actionable “obstacle of trade”; (ii) the practice must produce adverse trade effects or cause injury to a Community enterprise or industry; (iii) the practice should have a material impact on the economy, a sector or a region of the Community (the “material impact test”); and (iv) it must be in the overall interests of the Community to adopt remedial action (the “Community interest test”).”²⁷⁸ The measure complained about must be “attributed to the government of a third country, or its agencies”.²⁷⁹ As stated by MacLean, these tests ensure that “the necessary factual and substantive circumstances exist to justify action at the international level”, with, in general, “hard evidence” required by the Commission “to substantiate these claims”.²⁸⁰

²⁷³ Op. cit. footnote no. 247, at page 305.

²⁷⁴ Ibid. at page 317.

²⁷⁵ Op. cit. footnote no. 266, at page 201.

²⁷⁶ Ibid. at page 201.

²⁷⁷ Op. cit. footnote no. 247, at page 306.

²⁷⁸ MacLean, Robert M.; *The European Community’s Trade Barrier Regulation Takes Shape; It is Living Up to Expectations?* *Journal of World Trade* 33(6): 69-96, 1999, at page 71.

²⁷⁹ Ibid. at page 74.

²⁸⁰ Ibid. at page 94.

There are three groups of potential complainants under the TBR,²⁸¹ first, complaints by Community industries, the most popular option, second, complaints by one or more Community enterprise, less used, and third, complaints by member states of the EC,²⁸² which, as with this option under the NCPI, has never been used. The requirement to prove adverse trade effects is covered by both “effects caused (or threatened to be caused) to individual enterprises by trade barriers on third country markets”, is key under this title.²⁸³ Five tests have been used in determining the issue of “adverse trade effects”;

1. “inability to penetrate third country markets effectively (*Brazilian Cognac*²⁸⁴, *Japanese Leather Quotas*²⁸⁵, *Canadian Parma Ham*²⁸⁶)
2. Loss of Market Share by Community Exporters (*Brazilian Textiles*²⁸⁷, *Brazilian Sorbitol*,²⁸⁸)
3. Increased costs for Exporters (*Brazilian Steel Import Licensing*²⁸⁹)
4. Loss of Legitimately anticipated Revenues (*US Cross-Border Music Licensing*²⁹⁰)

²⁸¹ Op. cit. footnote no. 268, at page 990.

²⁸² Under Article 6 Council Regulation (EC) 3286/94.

²⁸³ Op. cit. footnote no. 266 at page 202.

²⁸⁴ 2001/97/EC: Commission Decision of 23 January 2001 terminating the examination procedure concerning measures affecting the trade of cognac in Brazil, Official Journal L 35, 06/02/2001 p. 53.

²⁸⁵ 98/354/EC: Commission Decision of 19 May 1998 adopted pursuant to Council Regulation (EC) No 3286/94 concerning obstacles to trade represented by Japanese practices in respect of imports of leather (notified under document number C (1998) 1373), Official Journal L 159, 03/06/1998 p. 65.

²⁸⁶ Notice of initiation of an examination procedure concerning an obstacle to trade, within the meaning of Regulation (EC) No 3286/94, consisting of trade practices maintained by Canada in relation to the imports of Prosciutto di Parma, Official Journal C 176, 22/06/1999 p. 6.

²⁸⁷ 1999/234/EC: Commission Decision of 17 March 1999 under the provisions of Council Regulation (EC) No 3286/94 concerning the Brazilian non-automatic import licensing system and its operation (notified under document number C (1999) 607), Official Journal L 86, 30/03/1999 p. 22.

²⁸⁸ 2002/440/EC: Commission Decision of 27 May 2002 terminating the examination procedure concerning obstacles to trade, consisting of trade practices maintained by Brazil in relation to imports of sorbitol, Official Journal L 151, 11/06/2002 p. 14.

²⁸⁹ 1999/44/EC: Commission Decision of 6 January 1999 pursuant to Council Regulation (EC) No 3286/94 concerning the Brazilian import licensing regime for steel plates (notified under document number C(1998) 4468), Official Journal L 14, 19/01/1999 p. 32.

²⁹⁰ 98/731/EC: Commission Decision of 11 December 1998 under the provisions of Council Regulation (EC) No 3286/94 concerning section 110(5) of the Copyright Act of the United States of America (notified under document number C (1998) 4033), Official Journal L 346, 22/12/1998 p. 60.

5. Increased Exports to the Community (*Chilean Swordfish*²⁹¹).²⁹²

A separate matter of “interference with the supply of input materials” was considered a factor in only one case, *Argentinean Raw Hides and Finish Leather*,²⁹³ with the issue of “injury” coming to the fore in only two cases, *Chilean Swordfish* and *Brazilian PREX Export Financing*,²⁹⁴ with the concept of “adverse trade effects [being] the predominant one in practice”.²⁹⁵

Two tests must be met, one that an obstacle to trade is caused in a third country market, and two, that there is “demonstration that these third country market effects have an impact on the economy of the Community”.²⁹⁶ The Community would therefore only take action for the benefit of the economy of the Community as a whole, and not in defence of just one industry or enterprise. Complaints under the enterprise heading are restricted to unilateral or plurilateral agreements, thus including the WTO agreements, but cannot be based on bilateral agreements.²⁹⁷ Despite this the TBR remains, for WTO matters, “the only market-opening instrument that can be triggered by the private sector and it offers a formal procedural context, and thus enforceable rights, to the complainants”.²⁹⁸ It is considered to be “an efficient private sector tool” in making the Commission take action, and in re-prioritisation of Commission action “in areas in which business faces difficulties”.²⁹⁹ Possible remedies under the TBR can include³⁰⁰

²⁹¹ 2000/296/EC: Commission Decision of 5 April 2000 under the provisions of Council Regulation (EC) No 3286/94 concerning the Chilean prohibition on unloading of swordfish catches in Chilean ports (notified under document number C(2000) 926), Official Journal L 96, 18/04/2000 p. 67.

²⁹² Op. cit. footnote no. 278, at page 84 et seq.

²⁹³ 98/618/EC: Commission Decision of 23 October 1998 under the provisions of Council Regulation (EC) No 3286/94 concerning measures maintained by the Republic of Argentina on the export of bovine hides and the import of finished leather (notified under document number C (1998) 3206), Official Journal L 295, 04/11/1998 p. 46.

²⁹⁴ Notice of initiation of an examination procedure concerning an obstacle to trade within the meaning of Council Regulation (EC) No 3286/94, consisting of the Brazilian export financing programme PROEX33, Official Journal C 108, 17/04/1999 p. 33.

²⁹⁵ Op. cit. footnote no. 278, at page 84.

²⁹⁶ Op. cit. footnote no. 266, at page 202.

²⁹⁷ Ibid. at page 202, footnote no. 8.

²⁹⁸ Ibid. at page 200.

²⁹⁹ Ibid. at page 209.

commencement of a dispute settlement procedure, or international consultation,³⁰¹ acceptance of an offer to change provisions by third countries,³⁰² the commencement of negotiations with the relevant third country under Article 133 EC, or the adoption by the EC of retaliatory measures.³⁰³

In reviewing the importance of the TBR, it should be borne in mind that it is not the only method of commencing a dispute settlement, as it is still possible informally to notify the Commission of any problems, and for EC member states to utilise the 133, formerly the 113 committee route.³⁰⁴ The voting mechanism for member states under the 133 committee route is however different from that used under the TBR mechanism, as “a minority of Member States, or even one Member State” can block this process “on the basis of (internal) policy considerations”.³⁰⁵ Under the TBR mechanism the Commission is the main decision maker, (“with the exception of the adoption of retaliatory measures”) with the Council,³⁰⁶ “at the request of a Member State (revising) the Commission’s decision by qualified majority”.³⁰⁷ The ECJ has however, in the 1989 *Fediol* judgment³⁰⁸ “refused to leave the determination of Community interest exclusively in the hands of the Commission”, subjecting it to a limited form of judicial review.³⁰⁹ In Van Eeckhaute’s opinion the ECJ will, in TBR cases, limit itself to traditional judicial review matters, of procedure and institutional misuse of powers, of “whether manifest errors of appreciation were committed”.³¹⁰ This opinion is endorsed in the CFI judgment in the *Prepared Mustard*³¹¹ case, which concerned the Commission’s decision not to proceed with a TBR process. The

³⁰⁰ Op. cit. footnote no. 268, at page 992.

³⁰¹ Article 12 (2) Regulation 3286/94.

³⁰² Article 11 Regulation 3286/94.

³⁰³ Article 12 (3) Regulation 3286/94.

³⁰⁴ Op. cit. footnote no. 266, at page 210.

³⁰⁵ Ibid. at footnote no. 211.

³⁰⁶ Article 14 TBR.

³⁰⁷ Op. cit. footnote no. 266, at page 211.

³⁰⁸ Op. cit. footnote no. 61, at paragraph 22.

³⁰⁹ Op. cit. footnote no. 266, at page 207.

³¹⁰ Ibid. at page 207.

³¹¹ Case T-317/02 *Federation des industries condimentaires de France (FICF) and Others v. Commission of the European Communities*, [2004] ECR II-04325.

CFI held,³¹² that judicial review of such a Commission decision “must be limited to verifying that the relevant procedural rules have been complied with”, that the facts of the case have been accurately represented, and that “there has not been a manifest error of assessment of those facts or a misuse of powers”.

The choice of either the 133 Committee route or the TBR for either a member state or industry complainant may therefore be a strategic decision.³¹³ Use of the TBR mechanism need not, however, lead to a panel complaint, as its mechanism also permits a negotiated settlement of the issue in question, thereby resolving the issue as quickly and as pragmatically as possible.³¹⁴ In a case where there is a choice of mechanisms for initiating a complaint to the WTO the TBR mechanism, given its investigation process, is more likely to be adopted in situations where “the merits of a case are not all that obvious”,³¹⁵ while the more straightforward cases are likely to take the more direct Article 133 route. Due process concerns in the TBR mechanism have been raised by Sundberg and Vermulst,³¹⁶ with regard to protection against fishing expeditions, and the lack of transparency in the whole process, particularly if it was felt that the EC was “throwing around its economic weight” in complaints against developing countries, in which situation the TBR could be construed as being itself an obstacle to trade.³¹⁷

It should be noted that the TBR has, in practice, generated less work than anticipated, with the 133 committee remaining the more popular route of initiating a panel hearing. The EC’s antidumping and anti-subsidies laws have a much higher strike rate of initiating a panel hearing than the TBR.³¹⁸

³¹² At paragraph 94 of its ruling.

³¹³ Op. cit. footnote no. 266, at footnote no. 211.

³¹⁴ Ibid. at page 209.

³¹⁵ Op. cit. footnote no. 268, at page 1005.

³¹⁶ Ibid. at page 1005.

³¹⁷ Ibid. at page 1005.

³¹⁸ Op. cit. footnote no. 278, at page 95.

4. Relationship with EC member state legislation

4.1 A relationship with member states

Having established the legal relationship between WTO law and EC law earlier in this chapter, and the issue of private party interaction through EC law with the WTO legal framework, the issue of how EC member state law interacts with EC law in the context of the WTO legal framework needs now to be addressed. Article 22(9) of the DSU, under the WTO regime, currently provides that the DSU rulings on the WTO agreements “may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a member”.³¹⁹ Federal governments are thereby made responsible for the actions of state or subnational governments, and are liable to pay any compensation due as a consequence of a ruling against the federal government arising from the actions of state or subnational governments. Kuijper, writing in 1995, was of the view that while these provisions “certainly apply to (federal) Member States” of the WTO, and that it did “not as yet apply to the Community”.³²⁰ He did allow for the argument that as the EC has exclusive competence for Article 133 matters, Article XXIV:12 should apply only to the EC and not to the member states of the EC (who also were signatories of both GATT 1947 and the WTO texts), however he doubted whether “that position would be acceptable to the Members of the WTO and GATT”.³²¹ This matter has yet to be clarified, either at the WTO level, or within the EC legal framework. An internal EC enforcement mechanism could however assist in resolving any possible difficulties in this area.

³¹⁹ Its counterpart under the GATT 1947 framework was Article XXIV:12 GATT 1947.

³²⁰ *Op. cit.* footnote no. 5, at page 68.

³²¹ *Ibid.* at page 68.

4.2 Enforcement mechanism

Both Kuijper³²² and Cottier³²³ are of the view that there is a need to develop an internal EC mechanism to ensure compliance by the member states of the EC with WTO commitments. In the absence of a new mechanism being designed, (Cottier) or in the absence of direct effect of WTO provisions within the EC legal system (Kuijper), then the most appropriate current provision of the EC treaty to be utilised would be the currently numbered Article 226 EC (ex. Article 169 EC). Flaws arise however with this approach, as Article 226 EC provides for a mechanism which is slower than the WTO dispute settlement procedure; should a third party WTO member state wish to take proceedings against an EC member state for non-compliance with WTO provisions, given the “so strictly bound [] deadlines” in the WTO dispute settlement mechanism, the panel process would be begun before the EC Commission would be able to commence Article 226 EC proceedings.³²⁴ While reference is made by both writers to the use of the then numbered Article 169 EC case against Germany regarding the GATT Dairy Agreement,³²⁵ they are both doubtful as to the efficacy of this method of enforcement. It is for this reason that Cottier proposes a “special mode of political monitoring by and within the EC of compliance and implementation of WTO and other international agreements by Member States”,³²⁶ arguing that Article 27 of the Vienna Convention on the Law of Treaties, which puts an obligation on the EC to honour its international treaty obligations would justify this development.³²⁷

³²² Ibid. at page 71.

³²³ Op. cit. footnote no. 1, at page 357.

³²⁴ Op. cit. footnote no. 5, at page 69.

³²⁵ Case C-61/94, *Commission v. Germany*, [1994] ECR I-3989.

³²⁶ Op. cit. footnote no. 1, at page 357.

³²⁷ Ibid. at page 357.

4.3 Issue of exclusive competence

The issue then arises as to what extent the WTO agreements cover areas of exclusive and shared competence between the EC and its member states. As stated by Lord Slynn of Hadley,³²⁸ the currently numbered Article 133 EC³²⁹ “has raised in particular difficult questions” as to the competence of the EC, and through it, the competence of the EC Commission, together with the issue of the relationship between the EC and its member states. This is complicated by the fact that the ECJ, in *Opinion 1/78*,³³⁰ found that the Common Commercial Policy had “a dynamic and evolutionary character”, and that the EC must have “the possibility .. to take account of new needs and new developments”.³³¹ This approach was reflected in *Opinion 2/91*,³³² when the ECJ stated, developing from the *ERTA* judgment,³³³ that the “principle of exclusivity” cannot be limited to areas where the EC has “adopted rules within the framework of a common policy, but is applicable in all areas corresponding to the objectives of the Treaty.”³³⁴ In *Opinion 1/94*³³⁵ the ECJ provided however that the now numbered Articles 95 EC³³⁶ and Article 308 EC,³³⁷ could not “in themselves confer exclusive competence on the Community”.³³⁸

³²⁸ Lord Slynn of Hadley in the forward to Emiliou and O’Keeffe, *The European Union and World Trade Law after the GATT Uruguay Round*, John Wiley and Sons, 1996, at page vii.

³²⁹ It should be pointed out that the expanse of Article 133 EC was extended by the Nice Treaty to GATS and TRIPS, of which more later in chapter 8.

³³⁰ *Opinion 1/78 on the International Rubber Agreement*, [1979] ECR 2871.

³³¹ Burgeois, Jacques HJ; *The Uruguay Round of GATT: Some General Comments from an EC Standpoint*, Ch 6 in Emiliou and O’Keeffe, *The European Union and World Trade Law after the GATT Uruguay Round*, John Wiley and Sons, 1996, at page 87 et seq.

³³² *Opinion of the Court of 19 March 1993. Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty. Convention No 170 of the International Labour Organization concerning safety in the use of chemicals at work. Opinion 2/91*, [1993] ECR page I-1061.

³³³ *Case 22/70 Commission v Council* [1971] ECR-263 (the *ERTA /AETR* judgment)

³³⁴ Emiliou, Nicholas; *The Allocation of Competence Between the EC and its Member States in the Sphere of External Relations*, Ch 3 in Emiliou and O’Keeffe, *The European Union and World Trade Law after the GATT Uruguay Round*, John Wiley and Sons, 1996, at page 45.

³³⁵ *Op. cit.* footnote no. 63.

³³⁶ Ex Article 100a EC.

³³⁷ Ex Article 235 EC.

³³⁸ *Op. cit.* footnote no. 334, at page 45.

In order to resolve this issue, in the absence of clarity from the EC Treaty, this matter has to be analysed through the use of principles developed by the ECJ, which in themselves are not clear. What is clear, in the matter of GATT/WTO Agreements, is that the Member States of the EC have “retained competence over budgetary matters”³³⁹ relating to WTO membership. In addition, Emilou, quotes Timmermans³⁴⁰ as arguing, relying on the case law of the ECJ, that even in the area of CAP common organisations, EC member states, even in this highly occupied field, “retained a parallel power to adopt national measures provided that they did not jeopardise the objectives and functioning of the common markets”,³⁴¹ however EC member states would be precluded from entering into international agreements in such policy areas. Emilou points out, relying on Kapetyn,³⁴² however, that in areas where there are no such common policies, EC member states were not so restricted.³⁴³ In World Trade matters there is, however, such a common policy, the Common Commercial Policy, which has been regularly extending its competences in the redrafts of Article 133 EC, most recently by the Nice Treaty, to cover GATS and TRIPs, of which more in chapter 8.

Kuijper, for his part, throws a spanner in the works, by pointing out that the ECJ, in *Opinion I/94* “does not use the term “mixed competence” (competence mixée), but “joint competence” (competence partagée).³⁴⁴ He goes on to say that the drawing of sharp distinctions between EC and member state competence may not be “helpful” in addressing issues “involving the management of the WTO Agreement”, and in issues of “cross retaliation”, adding that the duty to co-operate between the EC and its member states on this point is more

³³⁹ Denza, Eileen; The Community as a member of International Organizations, Ch. 1 in Emiliou and O’Keeffe, the European Union and World Trade Law after the GATT Uruguay Round, John Wiley and Sons, 1996, at page 13.

³⁴⁰ From an article in Dutch by Timmermans at [1978] S.E.W. 582, at page 586.

³⁴¹ Op. cit. footnote no. 334, at page 44.

³⁴² At [1978] S.E.W. 276, at page 286 et seq.

³⁴³ Op. cit. footnote no. 334, at page 44.

³⁴⁴ Op. cit. footnote no. 5, at page 60.

important.³⁴⁵ Should the issue of WTO obligations by the EC and its member states be relegated to the area of joint or shared competence under EC jurisprudence, then we enter another very difficult area of EC law, that of subsidiarity.

4.4 The issue of Subsidiarity

The principle of subsidiarity is written into the EC treaty in Article 5 EC. The lack of clarity as to the exact legal, as opposed to political, meaning of this Article, has led to efforts at an official level to define the meaning of the term "subsidiarity" within the EC context. The Conclusions of the Presidency of the European Council in Edinburgh³⁴⁶ "issued guidelines on the application of subsidiarity",³⁴⁷ which were subsequently put into effect by the Inter Institutional Agreement of 25th October 1993.³⁴⁸ A protocol was attached to the Amsterdam Treaty, which provided, in Article 1, that each of the institutions was to ensure that the principle of subsidiarity was complied with, which would include the ECJ. It was clear therefore that the concept of subsidiarity was to be judicable. This however, in practice, has proved to be problematic. Cottier sees the relegating of the issue of WTO competence within the EC to an issue of subsidiarity between the EC and its member states as strength from the point of view of the "internal power relations" within the EC.³⁴⁹ He does however, admit, that from an external perspective, this approach "hardly reinforces the position of Europe in relations with other Members of the WTO, in particular the United States".³⁵⁰ Cottier also highlights the issue of differentiating "law-making" and "law-applying" case law, and he advocates the politically pragmatic, though

³⁴⁵ Ibid. at page 60.

³⁴⁶ 11-12 Dec 1992.

³⁴⁷ Burns, Tom: Subsidiarity: Principle and Practice, (1995) SLT 67, at page 70.

³⁴⁸ Between the European Parliament, the Council and the Commission, OJ 1993, C 329/135.

³⁴⁹ Op. cit. footnote no. 1, at page 356.

³⁵⁰ Ibid. at page 356.

legally less satisfying approach of “team-work” between the “Commission and the national administrations concerned” in WTO disputes.³⁵¹

4.5 The political dimension

Addressing this issue from a political perspective, it is clear to Cottier that “non-compliance [with WTO law] may even threaten the consistency of the Union’s legal order”,³⁵² and with it the concept of the supremacy of Community law. The accommodation of the ECJ to WTO law could be seen as being a politically pragmatic approach of the ECJ to the reality of the evolving WTO legal order. Cottier points out that the supremacy of EC law depends on “legitimacy and persuasion”, with legal provisions which are “inconsistent with international obligations” putting this in jeopardy.³⁵³ In addition, non-compliance by the EC or part of the EC with WTO commitments would lose credibility of WTO member states for the EC, and would loose for the EC international market rights access.³⁵⁴ This view, while undoubtedly correct, has to be reconciled with the approach of the ECJ to the “recognition” of WTO law within the EC legal framework, as analysed earlier in this chapter. Allied to this is the acculturation of the non-judicial institutions of the EC to the WTO legal framework.

5. Conclusion

The above discussed line of cases in the ECJ, and its response to the legal effect of WTO law within the EC jurisdiction gives rise to the issue of the balance of powers between the EC and its member states, the EC institutions within the EC jurisdiction, and the role that the ECJ has developed for itself within the EC.

³⁵¹ Ibid. at page 354.

³⁵² Ibid. at page 366.

³⁵³ Ibid. at page 366.

³⁵⁴ Ibid. at page 366.

The issue of governance and the nature of law at both the EC and the WTO level will be examined in detail in chapter 7. While it has always been accepted and expected that the EC would operate on the basis of the rule of law, the extent to which the EC should interact with the WTO in a purely legal manner, unadulterated by issues of policy, remains a moot point. This is particularly relevant when a pure legal interpretation of a particular position would conflict with the “unanimous position of the Governments” of the EC *vis à vis* the World Trade Organisation.³⁵⁵ While it can be argued that the ECJ has been politically pragmatic in not granting direct effect to WTO law within the ECJ, in defence of its own interests, to grant such direct effect would also be “against the wishes of the Governments”.³⁵⁶ While the ECJ has not been attempting to so “govern Europe”,³⁵⁷ particularly in light of the ECJ’s ruling, sitting in Grand Chamber in the recent *Van Parys* case³⁵⁸ there clearly has been evidence of accommodation of EC law to WTO law where circumstances permits. Some writers would, however, argue that the ECJ has not been shy of developing law when it felt the need to do so, as in the development of the Treaty of Rome itself, converting “a traditional multilateral treaty”³⁵⁹ into a “constitutional charter governed by a form of constitutional law”.³⁶⁰ Mancini nevertheless has pointed out, the ECJ “would have been for less successful had it not been assisted by two mighty allies: the national courts and the Commission”.³⁶¹ On the issue of GATT and WTO, when the issue comes before the ECJ “even the Commission [has pleaded] against applying the international rules within the Community legal order”.³⁶² Perhaps a more effective analysis can be made of the situation when, unlike with many other international legal obligations entered into by the EC, the WTO, and before it GATT 1947, do have within them very effective dispute resolution mechanisms. The issue of the

³⁵⁵ Op. cit footnote no. 225, at page 395.

³⁵⁶ Ibid. at page 396.

³⁵⁷ Ibid. at page 396.

³⁵⁸ Op. cit. footnote no. 214.

³⁵⁹ Mancini, G. Federico "The Making of a Constitution for Europe" (1989) 26 CMLRev. 596, at page 596.

³⁶⁰ Weiler, J.H.H.; The Reformation of European Constitutionalism, JCMS, Vol.35, No1, page 97.

³⁶¹ Op. cit. footnote no. 359, at page 597.

³⁶² Op. cit. footnote no. 225, at page 395.

EC, and the ECJ's relationship with other international tribunals has caused problems for the ECJ in other instances. This issue is brought to the fore by Usher, who points out that this issue of possible overlapping jurisdictions with international tribunals "has arisen in a number of requests under Article 300 for an Opinion".³⁶³ He goes on to point out that in *Opinion 1/91*, which dealt with the creation of an EEA Court, the ECJ, in defence of its own prerogatives, held that "to confer ...jurisdiction on the EEA Court was incompatible with Community law".³⁶⁴ This is in line with the observation that the ECJ has shown itself to be hostile to the creation of, or accession to, other international "tribunals with overlapping jurisdiction" or membership.³⁶⁵ While the ECJ has exercised an ability to be both restrictive and developmental in its interpretation of the EC treaty, it is most activist in its efforts to "ensure the uniform control of the validity of Community acts," and the exercising of "judicial control over the activities of the EC bodies in the context of the legal process".³⁶⁶ It is perhaps somewhat naive to expect the ECJ to exercise its activist abilities at its own expense, in the defence of law of another organisation merely for the sake of the discipline itself.

The operation of the TBR can also be seen to be based on the rule of law, but not exclusively governed by it. Political issues, such as the Community interest come into play in deciding whether or not to proceed with a TBR action, even when all of the other legal tests have been met. To this extent the fact that the WTO is rule oriented rather than rule based, albeit becomes more and more legalised with time, could be said to be having an impact on how the EC, both through its case law, and its operation of the TBR, interacts with it. In addition, while the tripartite division of powers has been resolved at the EC level, such resolution is nowhere in sight at the WTO level, thereby by requiring caution on the part of EC actors in their interaction with the WTO. The synergy of EC and

³⁶³ Usher, John; *The Assertion of Jurisdiction by the European Court of Justice*, Ch. 14 in Capps, Patrick, Evans, Malcolm, and Konstadinidas, Strados; *Asserting Jurisdiction, International and European Legal Perspective*, Hart Publishing, 2003, at page 301.

³⁶⁴ *Ibid.* at page 302.

³⁶⁵ *Ibid.* at page 301.

³⁶⁶ *Ibid.* at page 306 et seq.

WTO law, in particular in the area of agriculture, will be analysed in detail in the next chapter.

Chapter 7

Synergy of WTO law and EC law

1. Introduction

2. Governance and the nature of law

2.1 Constitutionalisation of law at the EC level

2.2 Constitutionalisation of the WTO treaties

2.3 Positive integration law

2.4 Constitutional economics

2.5 EC and WTO governance

3. Judicial approach

3.1 The right of appeal

3.2 DSB/AB and ECJ in their institutional context

3.3 The operation of law at the EC and the WTO

3.3.1 Pre-litigation and litigation procedures

3.3.2 The hearing of the case

3.3.3 Amicus Curiae briefs

3.4. Judicial Activism in the EC and the WTO

4 The expiry of the peace clause

5 Conclusion

1. Introduction

Stepping back from the detail of this thesis for a moment, it is clear that we are now engaging in discussions on a post-Westphalian world order, where we have a “multi dimensional configuration of authority”¹ perhaps derived from Westphalian state order, but developed to such an extent that the constitutional pluralist would claim that “states are no longer the sole locus of constitutional

¹ Walker, Neil, Preface; in Walker, Neil (ed.), *Sovereignty in Transition*, Hart Publishing 2003, at page 9.

authority”,² joined specifically, in the context of this work, by the WTO and the EC. The globalisation and regionalisation trends that underpin in these two levels of governance, with their shared origins in Public International law, have³ an interdependent and reflexive relationship, with the development of “new and endemic boundary clashes” between these two polities leading to, as suggested by Walker, a transformation of mutual self understanding.⁴ This “contentious evolution” is in line with constitutional lawyers’ pluralistic thinking, which emphasises “the possibility of constitutional collision between high judicial authorities of different polities as the major point of contestation and crucial axis of rational authority”,⁵ an issue, both now, and for future development of law in this area.

In examining the legal impact of the WTO’s legal obligations on the EC, in any particular policy area, and in particular in agriculture, it is important to note that the fields of competence drawn by the founders of both the WTO and the EC were drawn differently, to the extent that the competence encapsulated within one and not within the other’s competence can cause differentiations and distortions in the development of particular policy objectives. While Petersmann has called for “new forms of cosmopolitical democracy” to reflect the “globalisation of economics, politics, law and the environment”, in order to “maximise human rights and real autonomy for personal and democratic self-development across the traditional boundaries of local and national democracies”,⁶ such an idealised objective is problematic for the WTO as, as referred to by Ladefoged Mortensen,⁷

² Ibid. at page 4.

³ as referred to in chapter 1.

⁴ Walker, Neil, *Late Sovereignty in the European Union*, Ch. 1 in Walker, Neil (ed.) *Sovereignty in Transition*, Hart Publishing, 2003, at page 27.

⁵ Ibid. at page 28.

⁶ Petersmann, Ernst-Ulrich; *From State Sovereignty to the “Sovereignty of Citizens” in the International Relations Law of the EU?* Ch.6 in Walker, Neil (ed.) *Sovereignty in Transition*, Hart Publishing, 2003, at page 146 at seq.

⁷ And discussed further in chapter 5.

“the WTO ... only governs one aspect of globalisation in actuality”⁸ while being held responsible for all aspects of globalisation in popular opinion. The absence or weakness of provision for environmental and labour issues in particular from the WTO framework of legal competence affects the development of WTO Agricultural policy, and contributes greatly to its “boundary clash” with the EC’s Common Agricultural Policy.⁹

The consequence of this particular boundary clash raises the issue of the exact “hierarchical status of ... treaty norms”,¹⁰ in particular legal systems, and for the purposes of this thesis, of WTO treaty norms within the EC, and WTO and EC norms within EC member states’ legal systems. A detailed analysis of this issue was conducted in chapter 6, with the current position of the ECJ being as reflected in the case of *Portugal v. Council*,¹¹ as endorsed by the Grand Chamber of the ECJ in the *Van Parys*¹² case, and the rejection of the concept of direct effect of WTO law within the EC, but with the development of the legality control debate, which keeps open, and unresolved, the issue of boundary clashes of EC law and WTO law. Possible future developments in this area will be discussed in chapter 8.

A further issue that comes to the fore in the analysis of the synergy of EC and WTO law in any particular policy area is the fact that the EC operates on the basis of the rule of law, while the WTO, having emerged from a history, in the Wyndham-White period of negotiation and multilateral democracy,¹³ has a

⁸ Mortensen, Jens Ladefoged; The Institutional Requirements of the WTO in an Era of Globalisation: Imperfections in the Global Economic Polity, E.L.J. 2000, 6(2), 176-204, at page 177.

⁹ See further chapter 8.

¹⁰ Jackson, John J.; Status of Treaties in Domestic Legal systems: A Policy analysis 86 AJIL (1992), 310, at page 312.

¹¹ Case C-149/96: *Portuguese Republic v Council of the European Union*, [1999] ECR p. I-8395.

¹² Case C-377/02, *Leon Van Parys NV v Belgisch Interventie- en Restitutiebureau (BIRB)*, [2005] ECR I-01465.

¹³ Jackson, John J.; Restructuring the GATT system, Royal Institute of International Affairs, London, 1990, at page 63.

current status of being rule orientated, rather than being rule based.¹⁴ The extent to which the WTO will develop its rule orientation into a rule-based approach in the future may be hampered by the prevailing dogma in one of its main sponsoring member states, the USA. Petersmann points out that the Kantian ideal of “‘international constitutionalism,’” or ‘cosmopolitan constitutional law’, is not “shared by most “realist” American politicians and lawyers” who “tend to favour the ‘hegemonic’ rather than ‘constitutional’ concepts of international law and foreign policy”.¹⁵ Loughlin refers to, in this context, “imperial sovereignty”¹⁶ as being the consequence of a lack of rule of law in a globalised constitutional context. In the policy area of agriculture, some of the developing and least developing nations of the WTO may well agree, “empire” at their expense, where the rules of global trade appear to be stacked against them.¹⁷ There is a need for the WTO to reflect Putin’s concept of a multi-polar world¹⁸ in order for the WTO to be a polity designed for longevity.

The difference in governance models of the EC and the WTO, referred to in chapter 1, will be analysed in greater depth in this chapter. The active governance structure of the EC, albeit flawed, and requiring adjustment, as reflected by the current debate on the issue at the EC level, is to be contrasted with the governance of the WTO which is perceived as suffering from a “lack of dynamism”.¹⁹ The role of the judicial mechanisms, the ECJ and the panels and Appellate Body of the WTO, and their accessibility and approach to decision making are key determining factors in the choice of trajectory for the

¹⁴ For further analysis of this point see Chapter 5.

¹⁵ Petersmann, Ernst-Ulrich; *Constitutionalism and WTO law: From a state-centred approach towards a human rights approach in international economic law*, Ch 2. in Kennedy and Southwick: *The Political Economy of International Trade law*, essays in Honour of Robert E. Hudec, Cambridge University Press, 2002, at page 35.

¹⁶ Loughlin, Martin, *Ten Tenets of Sovereignty*, Ch.3 in Neil Walker (ed.) *Sovereignty in Transition*, Hart Publishing, 2003, at page 84.

¹⁷ Some of the specific issues of these countries are addressed from an EC law context in chapter 3.

¹⁸ Inter alia, “Putin: Iraq declaration ‘step toward a multipolar world’”, AFP, February 11, 2003, <http://www.drumbeat.mlaterz.net/Jan%20Feb%202003/Putin%20looks%20toward%20multi-polar%20world%20021103a.htm>.

¹⁹ *Regional Integration and the Multilateral Trading System: Synergy and Divergence*, OECD, 1995, at page 52.

development of the legal jurisdictions of the EC and the WTO, key factors in the development of "boundary disputes" between the two polities.

The substantive agricultural law as operated by the EC²⁰ and the WTO²¹ also differs markedly. As referred to in chapter 1, the Punta del Este²² declaration stated, as one of the objectives of the Uruguay Round texts, the "increasing (of discipline) on the use of all direct and indirect subsidies and other measures affecting directly or indirectly agricultural trade".²³ In contrast the emphasis, to date, of the EC in the area of agriculture has been an emphasis on social stability of rural areas,²⁴ and ongoing controlled markets within the EC, as reflected in the second pillar of CAP and the evolving European Rural Policy. Added to the impact of the still anticipated conclusions of the current Millennium round of negotiations at the WTO, is the issue of the impact of the expiration of the "peace clause" on the current WTO agricultural law framework, and its potential impact on the CAP of the EC. A discussion on the expiration of the peace clause follows at the end of this chapter, with an analysis of CAP reform being undertaken in chapter 8.

2. Governance and the nature of law

In order to analyse the interaction of the laws of the EC and the WTO we need to select existing legal tools of analysis with which to frame our discourse. There is a need for new tools to be developed in order to reflect the reflexive nature of the relationship between EC and WTO law, and to reflect the fact that neither body, nor zone in legal discourse which they inhabit, are static points, but rather vectors, on a journey from Westphalian International Treaty texts, to some new location, passing through the area currently occupied by the EC, as a

²⁰ Covered in detail in chapters 2 and 3.

²¹ Covered in detail in chapters 4 and 5.

²² September 1986.

²³ Schott, Jeffrey J. assisted by Buurman, Johanna W., *The Uruguay Round: an Assessment*, Institute for International Economics, Washington D.C., 1994, at page 44.

²⁴ Streasa Conference 1958.

supranational legal order, benefiting from both supremacy and direct effect, yet to crystallise into a new, yet to be defined, grundnorm of the post-globalisation and regionalisation legal and regulatory age. In the interim, the people on the ground, both metaphysically, and literally, in the case of agriculture, are in need of some short to medium term forecasting as to the law and regulation that will affect their economic activities and ways of life. In the absence of new legal tools developed to tackle the reflexive nature of globalisation and regionalisation, reliance has to be made on those tried and tested, such as constitutionalism. As stated by Weiler, "constitutionalism is, too (some would say only), but a prism through which one can observe a landscape in a certain way, an academic artefact with which one can organize the milestones and landmarks within the landscape (indeed, determine what is a landmark or milestone), and intellectual construct by which one can assign meaning to, or even constitute that which is observed."²⁵

2.1. Constitutionalisation of law at the EC level

Weiler defines constitutionalism as "the process by which the EC treaties evolved from a set of legal arrangements binding upon sovereign states, into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private", with supremacy and direct effect being preconditions for this development.²⁶ As stated by Mancini,²⁷ in no other international organisation are there such "law-making and judicial powers" given,²⁸ with law being seen as a "basic instrument and a central symbol of European integration".²⁹ The constitutionalisation of EC law, has now become such an accepted phenomenon that legal academics do "not bother any longer with the constitutional premise".³⁰ It is, however, worth revisiting this

²⁵ Weiler, J.H.H.; *The Reformation of European Constitutionalism*, JCMS, Vol. 35, page 99.

²⁶ Ibid. at page 100.

²⁷ And referred to in chapter 1.

²⁸ Mancini, G. Federico "The Making of a Constitution for Europe" (1989) 26 CMLRev. 595 – 614, at page 595.

²⁹ Snyder, Francis G., *The effectiveness of European Community Law: institutions, processes, tools and techniques*, M.L.R. 1993, 56(1), 19-54, at page 19.

³⁰ Op. cit. footnote no. 25, at page 99.

issue in the context of the current discourse, given the “migration of the insights gained” in the EC debate, to, *inter alia*, the WTO.³¹ To counter any claims that the use of the legal tool of constitutionalism is an over ambitious analysis in the context of the WTO, it should be noted that when the EEC was originally set up, its foundation treaty “created no claim for (the EC) to be a self-sufficient legal order, separate from the international agreements that bound the Member States.”³² Within four decades the EC had carved out a niche for itself as “a new legal order”, with the EC treaty being regarded as “the highest source of law, i.e. a virtual Constitution for Europe”.³³ This was primarily through the judicial activism of the ECJ, and through the use of the secondary legislative tools of regulations, directives and decisions,³⁴ which it must be admitted, the WTO currently lacks. As stated in chapter 1, the interface of EC legal principles with WTO legal principles in a manner to ensure the smooth interaction of the European version of regionalism with the development of globalisation in the guise of the WTO, will prove to be a challenging task for the future. This is made particularly challenging as the quasi-legal, quasi-political principles of the WTO appear to be written in a different language from the legal and political principles of the EC.³⁵

2.2 Constitutionalisation of the WTO treaties

Academics have analysed the development of the WTO from GATT 1947 as the “most successful example of the ‘constitutionalisation’ of a worldwide

³¹ Ibid. at page 104.

³² Eleftheriadis, Pavlos; “Aspects of European Constitutionalism” ELR 1996 21(1) 32-42, at page 34.

³³ Ibid. at page 35.

³⁴ Jacobs, F.G.; “Is the Court of Justice of the European Communities a Constitutional Court? “Constitutional Adjudication in European Community and National Law, Essays for the Hon. Mr. Justice T.F. O’Higgins, Edited by Deirdre Curtin and David O’Keefe, Butterworth (Ireland) Ltd. 1992, at page 29 et seq.

³⁵ Such as supremacy and direct effect of Community law, constitutional protection of human rights, and the concept of “Community liability for unlawful conduct of its institutions or servants”. Dagtoglou, Prodros D.; The legal nature of the European Community, in Thirty years of Community Law, European Communities, 1983, at page 40.

organization”,³⁶ based on the principles of non-discrimination and freedom, allied to the compulsory nature of the WTO dispute settlement system. The rule-orientation, rather than the rule based system, of the WTO however, prevents the full development of a constitution at this level, in addition to the asymmetry of power between the member states of the WTO, within the WTO.³⁷ Given the greater development of the WTO legal system, in comparison to other regulatory frameworks at the global level, the question arises whether the WTO “should be the location of additional inter-nation coordinating power”, or if “given the alternatives, the WTO is capable of evolving into the best location for such power allocation”.³⁸ Even at a purely economic level³⁹ “only certain aspects” of the globalised “economic political space”⁴⁰ are under the control of a globalised regulatory framework, and “subject to formal governance.”⁴¹ Within its framework the WTO, as discussed in chapter 1, is seen as a weak enforcer, a weak monitor and a weak legitimiser, despite its increasing move from a negotiated framework to one more rule orientated, yet still not as rule based as the EC, with Ladefoged Mortensen pointing out that if the WTO documents are to become a “proto-constitution”⁴² this imbalance needs to be redressed. This has also proved to be of concern to the Consultative Board set up by the former WTO Director General Supachai Panitchpahdi, in their report on the future of the WTO,⁴³ of which more in chapter 8.

³⁶ Op. cit. footnote no. 15, at page 51.

³⁷ As was discussed in chapter 5.

³⁸ Jackson, John H.; Sovereignty, subsidiarity, and separation of powers: the high-wire balancing act of globalisation, Ch 1. in Kennedy and Southwick: The Political Economy of International Trade law, essays in Honour of Robert E. Hudec, Cambridge University Press, 2002, at page 31.

³⁹ As was discussed in chapter 5.

⁴⁰ To be discussed further in chapter 8.

⁴¹ Op. cit. footnote no. 8, at page 185.

⁴² Ibid. at page 203.

⁴³ The Future of the WTO – Addressing institutional challenges in the new millennium; report by the Consultative Board to the Director – General Supachai Panitchpahdi, WTO 2004. at <http://www.wto.int>.

2.3 Positive integration law

The development of “positive integration law” at the WTO level, which “goes far beyond the trade liberalization rules of GATT 1947”,⁴⁴ for Petersmann, develops “new constitutional challenges” which require redrafting and reform of the WTO “constitution”.⁴⁵ Examples of this “positive integration law” began to develop under GATT 1947, but are becoming more prevalent under the WTO. GATT 1947 examples, analysed further in chapter 5, include the two 1986 cases involving the EC challenging internal US tax law, the *Superfund* case,⁴⁶ and the *Custom User Fee* case.⁴⁷ Both these cases required Congress to amend its legislation, a problem for the defending party for the US, USTR,⁴⁸ to guarantee or negotiate upon. The internal constitutional structures of Canada were under scrutiny in the *Alcoholic Beverages (Canadian Liquor Board)* case,⁴⁹ with the panel requiring the Canadians to change the laws in question, which would have caused constitutional problems for the Canadians had the Canadian – US Free Trade Agreement not been recently signed.⁵⁰ WTO law, despite lacking direct effect within the EC legal system,⁵¹ clearly exercises legality control⁵² over EC law, requiring “far-reaching legislative, administrative, and judicial measures for the implementation of WTO rules on domestic laws”,⁵³ not least in the policy area of agriculture. This development will increasingly lead to a requirement for the WTO member states to re-examine the design and operation of the WTO, and to

⁴⁴ Op. cit. footnote no. 15, at page 53.

⁴⁵ Ibid. at page 51.

⁴⁶ *US - Taxes on Petroleum and Certain Imported Substances ("Superfund Act")* Panel Report adopted on June 17, 1987, BISD 34S/136.

⁴⁷ *US - Customs User Fee* Panel Report adopted on February 2, 1988, BISD 35S/245.

⁴⁸ United States Trade Representative.

⁴⁹ *Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*. Panel Report adopted on March 22, 1988, BISD 35S/37.

⁵⁰ For a fuller discussion of this case see Chapter 5.

⁵¹ See further chapter 6.

⁵² Zonnekeyn, Geert A.; “The Status of WTO Law in the EC Legal Order; The Final Curtain?” J.W.T. 34(3): 111-125, 2000, at page 121 et seq.

⁵³ Op. cit. footnote no. 15, at page 53.

seek a “new political consensus on the future legal evolution of the WTO”.⁵⁴ This increasing “‘harmonizaiton’ of national measures on the basis of ‘international standards’”⁵⁵ brings into question the origin and the drafters of these international standards which are driving the positive integration law of the WTO, given the lack of democratic input into the drafting of WTO texts, or in fact a lack of participatory politics in any guise, giving rise to the lack of public confidence in the system which has, at its most extreme to date, given rise to anti-globalisation protests around the world. As the WTO texts come to national legislatures or executives as “package deals” negotiated by trade diplomats, issues such as human rights and democratic constitutionalism are insufficiently safeguarded in the process, leading Petersmann to call for greater engagement in the WTO decision making process by “national parliaments, human rights activists, and other civil society representatives”.⁵⁶

2.4 Constitutional economics

The economic theory underpinning the WTO, that of market economics, has also come under scrutiny by legal academics, who point out the “well recognized exception” to free market economics, that of “market failure”,⁵⁷ often brought about, *inter alia*, by a failure in the competition or anti-trust regime in the particular economy. Petersmann points out that the US Supreme Court’s view is that “‘anti trust laws... are the Magna Carta of free enterprise’”,⁵⁸ with sections 1 and 2 of the 1890 Sherman Act, the source of US Anti-Trust law, and the inspiration behind EC Competition law, providing that “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several State, or with foreign nations, in declared illegal.”

⁵⁴ Ibid. at page 51 et seq.

⁵⁵ Ibid. at page 53.

⁵⁶ Ibid. at page 67.

⁵⁷ Op. cit. footnote no. 38, at page 25.

⁵⁸ Op. cit. footnote no. 15, at page 56, quoting *United States v. TOPCO Assoc. Inc.*, 405 U.S. 595, 610 (1972).

The origins of both GATT 1947 and the WTO agreements are international agreements negotiated by elites, with a strong “producer bias”,⁵⁹ with an emphasis on negotiating market access concessions for their home state, “while at the same time limiting that producing market when it comes to imports of goods”⁶⁰ from competitor countries, rather than on the development of overarching principles for the international trading regime which might ultimately restrict their own country’s freedom of movement. This situation, as pointed out by Jackson, “creates a constant tension in the procedures, negotiations, and even in the dispute settlement system of the WTO”.⁶¹ A competition law or anti-trust regime has still to be developed for the WTO trading regime;⁶² however, Petersmann is dubious as to recommendations from academics and NGO’s on this topic ever likely to be acted upon by the WTO, “as long as WTO bodies focus so one-sidedly on the interests of producers and trade bureaucracies”.⁶³ The issue of the lack of Anti-trust or Competition law at the WTO level will be discussed further in chapter 8, with EC Competition law as it affects agriculture also being covered in chapter 8.

2.5 EC and WTO governance

Current theories of governance advocate a role for a state engaged in the protection of a “pluralistic civil society”, “based on fair participation in the democratic processes” as a “new integrated approach to development”.⁶⁴ The objective of this governance model is the combination of “economic and material well-being with physical, moral, intellectual growth” of the state’s citizen, in an environment “in which people can express their own will in a free and responsible manner” with decisions being taken with a focus on the “developmental and

⁵⁹ Ibid. at page 56.

⁶⁰ Op. cit. footnote no. 38, at page 31.

⁶¹ Ibid. at page 31.

⁶² Which will be developed further in Chapter 8.

⁶³ Op. cit. footnote no. 15, at page 57.

⁶⁴ Weiss, Friedl: WTO decision-making: is it reformable? Ch 3. in Kennedy and Southwick: The Political Economy of International Trade law, essays in Honour of Robert E. Hudec, Cambridge University Press, 2002, at page 71.

environmental needs of present and future generations”.⁶⁵ It is to be assumed that this ideal should be striven for, not only at the state level, but also at the regional and global governance level. It is in this context that the EC has been grappling with the concept of human rights over the last number of years, and has made attempts to incorporate this into EC law, in the line of cases commencing with *Internationale Handelsgesellschaft*,⁶⁶ *Hoechst v. Commission*,⁶⁷ and even queried whether the EC could itself accede to the European Convention on Human Rights, in *Opinion 2/94*.⁶⁸ In a recent case before the ECJ, concerning animal health and a fishery common organisation,⁶⁹ the ECJ confirmed that fundamental rights were an integral part of the law enforced by the ECJ, and that the right to property is one of those fundamental rights. The court further held, however, that fundamental rights were “not absolute rights but must be considered in relation to their social function”. The right to property could be restricted “in the context of a common organisation of the markets”, as long as those restrictions were within the objectives and the general interest of the Community, and did “not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights”.⁷⁰

As Petersmann has pointed out, “human rights, and the need for constitutional safeguards to protect human rights against abuses of government powers, are nowhere explicitly mentioned in the more than 30,000 pages of the WTO Agreement and of its annexes and ‘schedules of concessions’”.⁷¹ A weakness of the WTO that it cannot properly “consider, balance and co-ordinate the various public goods and private interests implicated in such a broad programme”⁷² as is set out for it in its constituting documents. This is a point of direct relevance to

⁶⁵ Ibid. at page 71.

⁶⁶ Case 11/70 *Internationale Handelsgesellschaft*, [1970] ECR 1125.

⁶⁷ Case 46/87 *Hoechst v. Commission*, [1989] ECR 2859.

⁶⁸ *Opinion 2/94 (re ECHR)* [1996] ECR I-1759; [1996] 2 CMLR 265

⁶⁹ Joined Case C-20/00 and C-64/00, *Booker Aquaculture Limited (trading as Marine Harvest McConnell) v. The Scottish Ministers*, of the 10th July 2003, at paragraph 68.

⁷⁰ Ibid. at paragraph 68.

⁷¹ Op. cit. footnote no. 15, at page 32.

⁷² Op. cit. footnote no. 4, at page 32.

the debate in agriculture, given the reference to non-trade concerns in Article 20 of the Agreement on Agriculture,⁷³ and the development of the concept of multifunctionality of agriculture at the EC level, and the current reform of the EC's CAP under the mid-term review.⁷⁴ While it is accepted that the legal structures of both the EC and the WTO are more "citizen-oriented" with "legal guarantees of freedom, non-discrimination, rule of law and compulsory jurisdiction ...that go far beyond those of the power-oriented UN law",⁷⁵ particularly in its security council mode, this development, particularly at the WTO level, still has some way to go, not just to meet the aforementioned ideal for governance, but also to catch up with developments on this issue within the EC, leaving aside the issue of democratic deficit, which, in the purest definition of the term, still has to be addressed at the EC level.

It should be noted that the superimposition of WTO law onto the EC legal framework, in the area of the EC's common commercial policy, which is the vehicle for the EC's external agricultural policy, is strongly affecting the external frontiers of the EC's agricultural policy. The EC had not imposed "stringent legal disciplines such as those of the GATT rules on non-discriminatory and undistorted foreign trade competition",⁷⁶ which are now greatly influencing the EC's external CAP, as was discussed in chapter 3.

In addition, with this increasing impact of WTO law on EC law, perhaps not through direct effect, as a consequence of *Portugal v. Council*⁷⁷ but through the legality control tool discussed in chapter 6, it should be noted that the nature of the decision making structures at the WTO level in reaching conclusions and drafting treaties should be taken into account. It is Jackson's view that there is too much emphasis at the WTO on "reciprocity", with a high degree of emphasis of

⁷³ of which more in chapter 8.

⁷⁴ which is analysed in detail in chapter 8.

⁷⁵ Op. cit. footnote no. 6, at page 149.

⁷⁶ Petersmann, Ernst-Ulrich; International and European Foreign Trade Law: GATT dispute settlement proceedings against the EEC. CMLRev. 22: 441-487, at page 455.

⁷⁷ Op. cit. footnote no. 11.

“sovereignty” coming into play in WTO negotiations,⁷⁸ with less strategic steer on policy development than might be the case at the EC level. Jackson criticises this “mercantilist” approach to negotiation,⁷⁹ which does not best serve the needs of either international economists, or, the vision of governance espoused by Weiss,⁸⁰ referred to above. More complex ideas such as sustainability and multifunctionality, which underpin the EC’s view of agriculture, are less likely to thrive in a mercantilist forum. In addition, legal texts which are derived from such a negotiating and drafting process will, in all likelihood “be more ambiguous than national laws”, with “vague treaty norms”⁸¹ thereby being used to challenge EC and national regulations, which were drafted within a more democratic framework, and embracing the human rights, EC and national developmental requirements. Jackson points out that not only are traditional legal documents, not able “to accommodate the type of evolution, innovation and step-by-step change of circumstances that must be addressed” at all levels of governance, but such a statement could also be made about the current framework of the WTO, given its lack of secondary legal tools, with which it can develop the treaty texts, and the lack of an executive empowered to so develop them. This disjunction between the EC policy formulating framework and that of the WTO could, and in the case of the EC’s Common Agricultural Policy, will upset the “compromise of interests”⁸² achieved within the EC, and in the bi-lateral external relations of the EC on matters of Agriculture production, and trade in agricultural commodities.

Added to this problem is the relative lack of openness at the WTO, given that the underlying principle of WTO dispute settlement is that it is “intergovernmental and confidential.”⁸³ The procedure is “not designed as a public process” with little or no possibility for “private parties to establish their

⁷⁸ Op. cit. footnote no. 38, at page 30.

⁷⁹ Ibid. at page 30.

⁸⁰ Op. cit. footnote no. 64, at page 70 et seq.

⁸¹ Op. cit. footnote no. 10, at page 339.

⁸² Ibid. at page 339.

⁸³ White, Eric L.; *Written and Oral Submissions in WTO Dispute Settlement*, Ch. 9 Weiss, Freidl, *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals*, Cameron May 2000, at page 126.

claims or defend their interests”.⁸⁴ As stated by White, “this does not apparently correspond to modern conceptions of open government, democracy and procedural transparency”.⁸⁵ It should be noted that Article 18.2 DSU provides that “Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute”; although any party may make its own papers available to the public, it cannot so disclose papers of any other parties to the dispute. NGO’s⁸⁶ have been lobbying for more openness in this area, with the US President stating that US submissions to the dispute settlement mechanism would be made public.⁸⁷ The WTO has been striving to address this issue, both administratively and “judicially”. In this respect the situation at the WTO is in contrast to the EC policy on openness, for its institutions generally,⁸⁸ and at the ECJ in particular. This is reflected in the processes adopted for dispute resolution/ adjudication at both the WTO and EC level of governance, together with the contrasting approach of the “judicial authorities” of both organisations to *amicus curiae* briefs, of which more later. With this divergent backdrop to the development and implementation of law at the two levels of governance, the EC and the WTO, it is to be presumed that the judicial approach of the ECJ and the panels and appellate bodies would necessarily diverge.

3. Judicial approach

3.1 The right of appeal

Having highlighted in earlier chapters, and in this chapter, that the EC is a rule based system, while the WTO is a rule oriented system, it should be noted that the

⁸⁴ Ibid. at page 126.

⁸⁵ Ibid. at page 126.

⁸⁶ Non-governmental organisations.

⁸⁷ Op. cit. footnote no. 83, at page 126.

⁸⁸ As espoused in Council Decision 93/971 of 20 December 1993 on Public Access to Council Documents (93/731/EC), OJ 1993 L340/43, and Commission Decision 94/90 of 8 February 1994 on public access to Commission documents, OJ 1994 L46/58.

DSU “is already more “judicial” than perhaps the drafters intended,”⁸⁹ with “perhaps the most important step in the process” being the development of the Appellate Body.⁹⁰ International economic conflicts, prior to the founding of the WTO, had been considered to be “inseparable from politics in general”,⁹¹ as obligations had been deemed to be “rather vague and unspecific” and “imperfectly articulated”.⁹² As Cameron and Orava have pointed out this development of the law of the WTO is “a matter of degree and trend” which may be restricted when the “DSU review reaches its conclusions”.⁹³ This shift from the political to the legal framework for the resolution of international economic disputes is reflected, as pointed out by Petersmann, in the history of civilization, with,⁹⁴ “a gradual evolution from a power – oriented approach, in the state of nature, towards a rule-oriented co-operation”, with the Appellate Body fulfilling “the requirements of a judicial function”⁹⁵ thereby avoiding the power based, and potentially “welfare-reducing counter measures” which are sub-optimal methods of dispute settlement.⁹⁶ The approach of GATT 1947 was to favour “flexibility in settlement rather than certainty in rule application” which was reflected in the wide range of options for dispute settlement open to the GATT contracting parties.⁹⁷

⁸⁹ Cameron, James and Orava, Stephen J.; GATT/WTO Panels Between recording and Finding Facts: Issues of Due Process, Evidence, Burden of Proof, and Standard of Review in GATT/WTO Dispute Settlement, Ch. 12, in Weiss, Freidl (ed.), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals*, Cameron May 2000, at page 209.

⁹⁰ Cottier, Thomas; *Dispute Settlement in the World Trade Organization: characteristics and structural implications for the European Union*, CMLRev. 35, 325-378, 1998, at page 338.

⁹¹ Weiss, Freidel; *Improving WTO Procedural Law: Problems and Lessons from the Practice of other International Courts and Tribunals*, Ch 1, in Weiss, Freidel; *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals*, Cameron May 2000, at page 19.

⁹² *Ibid.* at page 19.

⁹³ *Op. cit.* footnote no. 89, at page 209.

⁹⁴ Quoting J. Jackson, in *World Trading System, Law and Policy of International Economic Relations*, 2nd ed. 1997, at page 110.

⁹⁵ *Op. cit.* footnote no. 90, at page 338.

⁹⁶ Petersmann, Ernst-Ulrich; *Alternative Dispute Resolution - Lessons for the WTO*, Ch. 2 in Friedl Weiss (ed.) *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the practice of Other International Courts & Tribunals* (Cameron May, London, 2000), at page 27.

⁹⁷ *Op. cit.* footnote no. 91, at page 21.

The WTO introduced a clearer framework for the operation of law at the global level, with the varying regimes of dispute resolution under GATT 1947 having been replaced by one “integrated and exclusive dispute settlement system”,⁹⁸ giving one voice to the Dispute Settlement System, by which members of the WTO “are required to solve their disputes solely by recourse to the rules and procedures of the DSU”.⁹⁹ In particular, the legal approach of the Appellate Body, “sets relevant standards” and provides “forceful feedback” to the panels, requiring them to “reason their findings thoroughly in the list of findings and precedents set by the Appellate Body”.¹⁰⁰

It should also be noted, given the very high number of members of the WTO that “not all States across the world share the same attitudes to matters of legal procedure,”¹⁰¹ thereby making the development of a WTO legal system more problematic than, for example, the development of the EC legal system, with its smaller number of members, and certain shared legal histories. Given this problem, added to the fact that treaties are often the work of diplomats rather than legal experts,¹⁰² it is an achievement that some form of legal order is being imposed by the WTO through its organs.

3.2 DSB/AB and ECJ in their institutional context

In comparing the dispute settlement system of the EC and the WTO it is interesting to note the different functions allocated to the ECJ and to the WTO dispute settlement system. The ECJ has been mandated to “ensure that the interpretation and application of this treaty the law is observed” pursuant to Article 220 EC. The dispute settlement system of the WTO, for its part, has been set up to “preserve the rights and obligations of Members under the covered

⁹⁸ Ibid. at page 22.

⁹⁹ Ibid. at page 22.

¹⁰⁰ Op. cit. footnote no. 90, at page 339.

¹⁰¹ Watts, Sir Arthur KCMG QC, Burden of Proof, and Evidence before the ICJ, Ch. 15 in Weiss, Freidl (Ed.), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals*, Cameron May 2000, at page 289.

¹⁰² Op. cit. footnote no. 91, at page 18.

agreements, and to clarify the existing provisions of those agreements in accordance with the customary rules of interpretation of public international law” under Article 3.2 DSU.¹⁰³ The EC treaty is much more explicit about the legal nature of rights and obligations under its framework, which is reflected in the fact that the dispute settlement procedure of the EC is allocated the title of “Court of Justice” and is permanently constituted by “persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence”.¹⁰⁴

In contrast the panels of the WTO have to be established, pursuant to Article 6 DSU, to address the issues of a particular case, and are to be composed of “well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member”.¹⁰⁵ Even the Appellate Body of the DSU, a standing body of the WTO, with rotating membership¹⁰⁶ of seven people, each appointed for a four year period, and may be reappointed once, are to be “persons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally,” while being unaffiliated with any government. The composition of the Appellate Body of the WTO, given the required composition, is more enabled to create a new legal jurisdiction for the WTO than might be the case in a panel, which could be devoid of any legally trained individuals. The difference in staffing qualifications at the two levels reflects the rule orientated approach of the WTO, in contrast to the rule based approach of the ECJ at the level of the EC.

¹⁰³ Ibid. at page 20.

¹⁰⁴ Article 223 EC.

¹⁰⁵ Article 8.1 DSU.

¹⁰⁶ Article 17 DSU.

The dispute settlement system of the WTO, like the litigation system of the EC, is now compulsory, under Article 23(1) of the DSU,¹⁰⁷ with the Dispute Settlement Body, a political body, being required to adopt un-appealed panel reports and all Appellate Body reports. Non-adoption of reports only happens in the absence of a consensus at the DSB not to adopt such a report.¹⁰⁸ Bethlehem points out that this “political oversight of the adjudicatory process” of the dispute settlement panels may be expected to have repercussions on the decision making of the panels.¹⁰⁹ Such a political oversight of the workings of the ECJ is not available within the EC. On the contrary, the political bodies of the EC are entitled,¹¹⁰ along with the Member States of the EC,¹¹¹ not only to sue, but to be sued, within the EC legal framework, such cases to be adjudicated upon by the ECJ. This different approach to the traditional “tri-partite” division of powers at the two levels, (between the legislature, executive and judiciary), again will have an impact on the potential role of law within the two jurisdictions. This issue is of particular relevance in the context of the “much criticised role of the WTO Secretariat in drafting of WTO Panel reports”.¹¹² That said, it should be noted that “attitudes and perceptions” at the WTO panel and Appellate Body proceedings “have been fully dedicated to a legal approach”.¹¹³ Decisions are made strictly on the basis of the information presented to the proceedings, all parties being in a

¹⁰⁷ Kuijper, Pieter Jan; *the New WTO Dispute Settlement System; the Impact on the European Community*, J.W.T. 1995, 29(6), 49-71, at page 50.

¹⁰⁸ Article 16 DSU and Article 17 DSU.

¹⁰⁹ Bethlehem, Daniel; *Submissions on Points of Fact and Law: Written and Oral Pleadings before the International Court of Justice*, Ch. 11 in Weiss, Freidl, (ed.) *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals*, Cameron May 2000, at page 175.

¹¹⁰ Pursuant to Article 230 EC, by way of judicial review, Article 232 EC, for failure to act pursuant to the EC Treaty, and Article 237 EC with regard to the actions of the European Central Bank, the European System of Central Banks and the European Investment Bank.

¹¹¹ Pursuant to Articles 226 and 227 EC, whereby the Commission, under Article 227 EC, a member state, enforces compliance with the EC Treaty on an EC member state, and Article 230 EC, whereby a member state of the EC can apply for the review of the legality of acts adopted by EC institutions.

¹¹² Usher, J.A.; *Joinder of Actions, Submission of Observations in References for Preliminary Rulings, and Intervention by Member States, Community Institutions, and any Other Person in ECJ Proceedings*, Ch. 7 in Weiss, Friedl (ed.) *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the practice of Other International Courts & Tribunals* (Cameron May, London, 2000), at page 89.

¹¹³ *Op. cit.* footnote no. 90, at page 337.

position to rebut and comment on material presented by other parties to the case,¹¹⁴ with proceedings being conducted in as formal, and law like a manner as possible. Another important difference in the operation and development of law in the two jurisdictions is the presence of a “guardian of the treaty”, the EC Commission, within the EC legal structure.¹¹⁵

The dispute resolution system of the WTO is reliant on member states of the WTO to initiate complaints and to request the formation of panels. The decision to litigate at the WTO will be strongly influenced by power politics, with only the strongest of players being the most likely to initiate complaints, unless supported by a group of like minded member states of the WTO. In addition it is worth noting that the EC legal jurisdiction engages all the courts and tribunals of its member states, through its preliminary reference procedure, Article 234 EC, engaging the private natural and legal individual in the process of European law compliance through the well established EC legal principles of supremacy and direct effect. With this aspect lacking at the WTO level, and little possibility of it being engaged in, in the near future, the possibility of the development of WTO law through “judicial” activism is hampered. This development is also further hindered by the provisions of Article 3.2 of the DSU, which requires the preservation of the “rights and obligations of Members under the covered agreements”, and the restriction on the DBS not to “add to or diminish the rights and obligations” under those agreements, thereby providing “security and predictability to the multilateral trading system”. This operates as an “apparent injunction against creativity” of interpretation by the WTO panels and Appellate

¹¹⁴ Ibid. at page 337 et seq.

¹¹⁵ Pursuant to Articles 226. The EC process under Article 227 (ex Article 170, EC) requires member states of the EC to make a complaint to the Commission about the behaviour of another member state, with the Commission issuing a reasoned opinion on the matter. The complainant state brings the matter before the ECJ “only after the Commission has delivered a reasoned opinion on the matter or has failed to do so within three months of the date on which the matter was brought before it.” (Lasok KPE QC; Role and efficacy of the EC Commission’s reasons Opinion in Article 169/170 proceedings, Ch. 4, in *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International courts and Tribunals* by Freidl Weiss, Cameron May 2000, at page 55 et seq).

Body.¹¹⁶ Thus one of the most dynamic aspects of EC law is noticeably absent, and it would appear, will remain absent in the foreseeable future, from the WTO legal framework.

3.3 The operation of law at the EC and the WTO

3.3.1 Pre-litigation and litigation procedures

While the political dimension of dispute resolution at the WTO has been highlighted in chapter 5, the context being one of greater fluidity of approach to regulation, which permeates the WTO system,¹¹⁷ with Jackson's "rule-orientation" facilitating a system of "bargaining and negotiation," it does not follow that the more legalised system of dispute resolution in the EC is devoid of a political input. Under the Article 226 (formerly Article 169) procedure of the EC, the most comparable EC procedure to that operated by the WTO,¹¹⁸ the European Commission is enabled to deliver a reasoned opinion on a perceived breach of the EC treaty by one of the EC member states, and should the member state fail satisfactorily to respond to such opinion, then the Commission is entitled to bring the matter before the ECJ. As Lasok has pointed out,¹¹⁹ this decision of the Commission is in itself, political in nature. Any pre-litigation settlement being made between the Commission and the relevant member state in order to avoid litigation under Article 226 EC is not necessarily the final position on any matter. A reference under Article 234 EC from any court or tribunal of the EC may bring both the original breach, and any such subsequent agreement between the Commission and the Member State under the scrutiny and review of the ECJ.

¹¹⁶ *Op. cit.* footnote no. 109, at page 177.

¹¹⁷ Jackson, John H.; *The Jurisprudence of GATT and the WTO; Insights on treaty law and economic relations*, Cambridge University Press, 2000, at page 8.

¹¹⁸ Kuijper, Pieter Jan; *The pre-litigation stage in the WTO Dispute Settlement Procedure and in the EC Infringement procedure*, CH. 5 in Weiss, Freidl; *Improving WTO Dispute Settlement Procedures: Issues and lessons from the Practice of Other International Courts and Tribunals*, Cameron May 2000, at page 67.

¹¹⁹ Lasok KPE QC; *Role and efficacy of the EC Commission's reasons Opinion in Article 169/170 proceedings*, Ch. 4, in *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International courts and Tribunals* by Freidl Weiss, Cameron May 2000, at page 63.

Such a consequence would not follow from a panel or Appellate Body ruling at the WTO. Despite the role which the ECJ has developed for itself within the EC as being the final arbiter in dispute resolution, giving primacy to the (EC) rule of law, pursuant to the Treaty of Rome's underpinning of "the separation of powers between the executive, the legislature and the judiciary", ¹²⁰ as was discussed in chapter 5, this has, as was discussed in chapter 6, given rise to problems in the context of the EC's relationship with the WTO, and the interconnectivity between the two legal systems, with the ECJ being unable to govern Europe on its own, ¹²¹ leading to what Zonnekeyn referred ¹²² to as being "an obvious assault to the "trias politic" principle", ¹²³ through what is clearly not a legal argument.

The request for consultations under the WTO procedure (or lack thereof) differs somewhat from that which operates under the EC procedure. ¹²⁴ Under the DSU a request can be made either for a consultation, under Article 4.4 DSU, which "does not have a clear match under the EC Treaty", ¹²⁵ or for the establishment of a panel, under Article 6.2 DSU, with the requirements being stricter for the latter option. ¹²⁶ While it was intended for the DSU to impose "stricter requirements" procedurally than was the case under the pre-WTO documents, Jansen points out that it would appear that "basis requirements of fairness" and of "a judicial or quasi-judicial procedure" have been compromised in the interests of "procedural economy". ¹²⁷ He further points out that while procedures have been set out, the case law of the WTO does not appear to have interpreted or have applied these procedures in a "very coherent and convincing manner". ¹²⁸ This has led Jansen to conclude that this lack of coherence is "a

¹²⁰ Op. cit. footnote no. 32, at page 33.

¹²¹ Editorial Comment; Strengthening GATT, CMLRev. 1983 page 396.

¹²² And which was referred to in chapter 5.

¹²³ Op. cit. footnote no. 52, at page 121.

¹²⁴ Op. cit. footnote no. 118, at page 67.

¹²⁵ Ibid. at page 67.

¹²⁶ Jansen, Bernhard; Scope of Jurisdiction in GATT/WTO Dispute Settlement: Consultations and Panel Requests, Ch. 3 in Weiss, Freidl; Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals, Cameron May 2000, at page 45.

¹²⁷ Ibid. at page 49.

¹²⁸ Ibid. at page 46.

matter of serious concern”, and in its absence that it is “not at the present time possible to liken the WTO dispute settlement procedures to a court-like procedure”.¹²⁹ It is also important to be reminded in this context that WTO panel and Appellate Body findings, unlike judgments from the ECJ, are still subject to political approval, having to go through the process of adoption, pursuant to Article 16 DSU, for panel reports, and Article 17.14, for the Appellate Body, prior to being legally binding,

3.3.2 The hearing of the case

A comparison can be made between the manner in which hearings are heard at the WTO and EC levels. In the EC courts the hearings are normally conducted in public. While both the ECJ and the CFI¹³⁰ “enjoy a broadly-defined authority to conduct hearings in camera”,¹³¹ this right is exercised restrictively. In camera hearings are normally reserved for the “confidential consideration of commercial information, and those involving medical information of an intimate nature”.¹³² As the CFI hears more of the cases coming under these classifications, the CFI utilises the in-camera option more often than the ECJ. If only one part of a case involves confidential matters, then the practice is for the court to sit in camera only for that part of the proceedings, and to reopen the court for the balance of the case.¹³³

In contrast to the ECJ practice on this matter WTO proceedings are “conducted in private, to the exclusion of the public, on the basis of the confidentiality of the submissions of the parties”.¹³⁴ This approach, allied to the relative informality of proceedings at the WTO,¹³⁵ in contrast to the European

¹²⁹ Ibid. at page 46.

¹³⁰ Court of First Instance.

¹³¹ Plender, Richard QC, LLD; Oral Procedures in the Community Courts, Ch. 10 Weiss, Freidl, (ed.) in *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals*, Cameron May 2000, at page 156.

¹³² Ibid. at page 156.

¹³³ Ibid. at page 156.

¹³⁴ Op. cit. footnote no. 109, at page 176.

¹³⁵ Ibid. at page 191.

Court's strict legal formalities, has led to the criticism that the WTO procedures and practices mirror "more the form of international commercial arbitration" in private disputes, than the settling of disputes between states which have important public dimensions and in which important community interests are affected.¹³⁶ To add to the issue, not only are the proceedings conducted in closed session, but so are the proceedings before the Appellate Body under Article 17.10 DSU, despite the fact that on appeal "is to be "limited to issues of law",¹³⁷ and should not therefore cover confidential commercial information.¹³⁸ This mis-match between the procedures adopted by the WTO dispute settlement process, and the global impact of the findings of the panels and the Appellate Body has led to criticism, with Plender, for one, stating that there is "no good reason why hearings on the appellate level have to be confidential".¹³⁹ This issue is also addressed by the recent Consultative Body report,¹⁴⁰ which will be discussed further in chapter 8.

3.3.3 Amicus Curiae briefs

As flagged up in chapter 5, the role of third parties at the EC and the WTO, during the course of proceedings, differs quite markedly. The WTO dispute settlement process frequently involves third parties at all stages,¹⁴¹ with "purely bilateral dispute settlement proceedings" being "an exception in the WTO." All WTO member states potentially have an interest in the "quasi-judicial application" of WTO law.¹⁴² The issue however of amicus curiae briefs, from non-WTO member states interested parties, came before the Appellate Body of the WTO in *Shrimp-Turtle*.¹⁴³ The original panel, upon receiving a number of unsolicited amicus curiae briefs from environmental NGO's had decided that "it

¹³⁶ Ibid. at page 177.

¹³⁷ Article 17.6 DSU.

¹³⁸ Op. cit. footnote no. 131, at page 159.

¹³⁹ Ibid. at page 159.

¹⁴⁰ Op. cit. footnote no. 43, at page 58, point 261.

¹⁴¹ Op. cit. footnote no. 96, at page 34.

¹⁴² Ibid. at page 34.

¹⁴³ *United States - Import Prohibition of Certain Shrimp and Shrimp Products* AB 1998-4, WT/DS58/AB/R, 12 October 1998, (98-3899).

was not entitled to consider them”.¹⁴⁴ The Appellate Body however, decided that a “panel is entitled to consider non-solicited briefs”,¹⁴⁵ on an interpretation of Article 13 DSU, an exercise in “judicial activism” at the WTO level. As pointed out by White, the reasoning of the Appellate Body on this point was based on Article 17.9 DSU, which “gives the Appellate Body broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements.”¹⁴⁶ While the Appellate Body went on to provide that there was “no right to submit amicus curiae briefs and the Appellate Body has no obligation to consider them”,¹⁴⁷ the ruling in *Shrimp/Turtle*¹⁴⁸ can be seen to have “opened the door to the presentation of submissions by private parties to a panel,”¹⁴⁹ as discussed in chapter 5. White advocates the adoption of a controlled and regulated process for the submission of amicus curiae briefs, as this would “no doubt encourage outside participation and even perhaps enhance the persuasive character”, in the eyes of the general global public, of the WTO dispute settlement procedure.¹⁵⁰

In contrast, at an EC level, institutional involvement in litigation before the ECJ is much more pronounced, with very few cases, unlike at the WTO, being heard involving one member state litigating against another. This arises as the EC Treaty “expressly requires in Art. 227 that a member state which claims that another member state is in breach of its treaty obligations must first bring the matter before the Commission”.¹⁵¹ The Commission operating in its “overt policing role”,¹⁵² in a case to which the Commission is not an original party, “empowered rather than required to submit observations” which it “regards itself

¹⁴⁴ Op. cit. footnote no. 83, at page 127.

¹⁴⁵ Ibid. at page 127.

¹⁴⁶ Ibid. at page 127.

¹⁴⁷ Ibid. at page 128.

¹⁴⁸ Op. cit. footnote no. 143.

¹⁴⁹ Van Eeckhaute, Jean Charles; Private Complaints against Foreign Unfair Trade Practices, J.W.T. 33(6) 199-213, 1999, at page 212.

¹⁵⁰ Op. cit. footnote no. 83, at page 128.

¹⁵¹ Op. cit. footnote no. 112, at page 89.

¹⁵² Ibid. at page 89.

as being under a duty” to submit.¹⁵³ For its part, the Council is empowered to make submissions only “where appropriate”,¹⁵⁴ with both the Commission,¹⁵⁵ and ultimately the ECJ,¹⁵⁶ being obliged to take the totality of the body of EC law into account in their submissions and deliberations respectively.

3.4. Judicial Activism in the EC and the WTO

The issue of judicial activism has been referred to a number of times so far in this thesis, and it is worth therefore allocating some small space to this issue. In this chapter Article 3.2 DSU has been referred to as being restrictive of the development of “judicial” activism at the WTO level, as the DBS cannot alter the obligations of WTO member states under the WTO agreements. As was stated earlier, this provision has been described as being an “apparent injunction against creativity” at the WTO.¹⁵⁷ Nevertheless, the *Shrimp-Turtle* case,¹⁵⁸ decided in the WTO era, has exhibited a level of judicial activism in dealing with amicus curiae briefs, on the basis that this was a development of a procedural rule, as opposed to a development or amendment of the DSU.¹⁵⁹ The same case, as referred to in chapter 1, also recognised that the “interpretation of a treaty” is an evolving matter, with the use of subsequent developments in international law being used to interpret a treaty, this view being reaffirmed by the panel in the *Poultry*¹⁶⁰ case. This level of judicial activism might be described as activism within limited confines. This can be contrasted with activism by the ECJ, which could be described as, relatively speaking, activism within broad confines.

The ECJ’s approach to its founding treaty, the Treaty of Rome, can only be described as being highly creative at times, to the extent that we can say that

¹⁵³ Ibid. at page 94.

¹⁵⁴ Ibid. at page 94.

¹⁵⁵ Article 226 EC.

¹⁵⁶ Article 220 EC.

¹⁵⁷ Op. cit. footnote no. 109, at page 177.

¹⁵⁸ Op. cit. footnote no. 143.

¹⁵⁹ Op. cit. footnote no. 83, at page 127.

¹⁶⁰ The Appellate Body Report in *European Communities - Measures Affecting the Importation of Certain Poultry Products*, (EC- Poultry) WT/DS69, adopted on 23 July 1998.

the ECJ has managed to develop a “new legal order”.¹⁶¹ Such judicial activism can be evidenced in a number of ECJ cases, amongst them *Parti Ecologiste Les Verts*¹⁶² where the court was quite clearly not “interpreting” the treaty, but rather it was “updating” it, inserting the word “Parliament” into Article 173 (now Article 230),¹⁶³ an article clearly devoid of the word “Parliament” at that time. This level of judicial activism is clearly much broader than that set out for the WTO’s dispute settlement bodies, and while the ECJ’s activism has occasionally caused political discomfort amongst the other EC institutions and the EC’s member states, little restraint has since been placed on the ECJ, other than political pressure. This perhaps is reflecting the fact that the EC operates on the basis of the rule of law, with the activities of the EC’s legislature and executive being subject to judicial scrutiny, with the ECJ having the final word on any matter brought before it by way of litigation. This primacy of the judiciary within the EC structure has however been ceded by the ECJ in matters dealing with the WTO, as evidenced in the line of ECJ cases culminating in *Portugal v. Council*,¹⁶⁴ which was discussed in depth in chapter 6.

Development of law at the GATT/WTO level has clearly been evidenced through the panel and Appellate Body findings discussed in chapter 5. It is possible that these developments in GATT/WTO law could be attributed to being development of procedural rules, along the lines of the Appellate Body in *Shrimp-Turtle*¹⁶⁵ Appellate Body, rather than being developments contrary to Article 3.2 DSU. It will be interesting to see how future panel and Appellate Body rulings will manage to walk the Article 3.2 DSU tightrope, in an institutional structure where less sovereignty has been ceded from the member states to the multinational organisation than is the case in the EC, and in light of the fact that it is the member states at the WTO who close the books on WTO panel and

¹⁶¹ Op. cit. footnote no. 32, at page 34.

¹⁶² Case 294/83 *Parti Ecologiste Les Verts v. European Parliament*, [1986] ECR 1339, at paragraph 25 et seq.

¹⁶³ Which provides for judicial review of acts of the institutions of the EC.

¹⁶⁴ Op. cit. footnote no. 11.

¹⁶⁵ Op. cit. footnote no. 143.

Appellate Body litigation through the adoption of panel¹⁶⁶ and Appellate Body reports¹⁶⁷ through the Dispute Settlement Body.

4. The expiry of the peace clause

While analysing the synergies (or the lack of them) of the WTO Agreement on Agriculture, with the EC's CAP, and its legal tools, it is worth noting that since the expiry of the peace clause (contained in Article 13 of the WTO Agreement on Agriculture), other WTO Agreements have made further inroads into impacting on the nexus of the WTO/EC legal dynamic in agriculture, thus further altering the reflexive relationship between the WTO and the EC in the area of agriculture. Both domestic support measures, under Articles 13.a and 13.b, and export subsidies, Article 13.c. of the Agreement on Agriculture, have become more exposed to WTO dispute settlement litigation pursuant to GATT 1994, and the Agreement on Subsidies and Countervailing Measures (SCM). These, in particular, work out as domestic support measures under Annex 2 of the Agreement on Agriculture, commonly known as "green box" measures,¹⁶⁸ due to the fact that they were non - or minimally - trade distorting, become actionable under the "countervailing duties" heading, and also become subject to actions under Article XVI GATT 1994, under its subsidies heading, and to actions under part III of the Subsidies Agreement,¹⁶⁹ which deals with actionable subsidies. "Green Box" provisions also become actionable under Article II GATT 1994 "in the sense of paragraph 1(b) of Article XXIII of GATT 1994".¹⁷⁰ Article II GATT 1994 provides a schedule of concessions, while paragraph 1(b) of Article XXIII of GATT 1994 provides for nullification and impairment actions, which is elaborated upon in the DSU.

¹⁶⁶ Article 16 DSU.

¹⁶⁷ Article 17.14 DSU.

¹⁶⁸ Green box measures were dealt with in more detail in chapter 4.

¹⁶⁹ Part III of the Subsidies Agreement covers Article 5, adverse effect, Article 6, serious prejudice, and Article 7 remedies.

¹⁷⁰ Article 13.a.ii Agreement of Agriculture.

The expiry of Article 13 of the Agreement on Agriculture further exposes domestic support measures that fully comply with Article 6 of the Agreement on Agriculture. Said Article 6 covers domestic support commitments and aggregate measures of support (AMS),¹⁷¹ and includes, *inter alia*, Article 6.4¹⁷² (*de minimis* provisions) and Article 6.5 (production limiting provisions). These provisions, since the expiry of Article 13, are now fully exposed to claims that they are countervailing duties under Article VI GATT 1994,¹⁷³ and part V of the Subsidies Agreement. In addition, they are now subject to the provisions of paragraph 1 of Article XVI of GATT 1994,¹⁷⁴ and Articles 5 and 6 of the Subsidies Agreement.¹⁷⁵ They also become subject to actions “based on non-violation nullification of impairment of the benefits of tariff concessions accruing to another Member under Article II GATT 1994,¹⁷⁶ in the sense of paragraph 1(b) of Article XXIII of GATT 1994”.¹⁷⁷ Export subsidies, for their part, become fully exposed to the provisions of the countervailing duties provisions, and are subject to actions under Article XVI of GATT 1994¹⁷⁸ and Articles 3,¹⁷⁹ 5¹⁸⁰ and 6¹⁸¹ of the Subsidies Agreement. The SCM agreement however has its own time limitation imposed upon it by virtue of its own Article 31, which provides that “the provision of paragraph 1 of Article 6 and the provisions of Article 8 and Article 9 shall apply for a period of five years” from the entry into force of the WTO Agreement, and therefore expired on the 31st December 1999, “because

¹⁷¹ Covered in more depth in chapter 4.

¹⁷² A member shall not be required to include in the calculation of its Current Total AMS support payments that (i) are product specific, if they do not exceed 5% of the value of production of that commodity, and (ii) non product specific support where same do not exceed 5% of the value of the country's total agricultural production, Article 6(4)a. For developing countries the *de minimis* level is 10% and specified agricultural input subsidies are excluded from the AMS (Articles 6.2 and 6.4).

¹⁷³ Which is titled Anti-dumping and Countervailing measures.

¹⁷⁴ Subsidies.

¹⁷⁵ Article 5, Adverse effect, and Article 6, Serious Prejudice.

¹⁷⁶ Article II GATT is entitled “Schedules of Concessions”, with paragraph 1(b) of Article XXIII of GATT 1994 deals with “Nullification and Impairment Actions”.

¹⁷⁷ Article 13.b.iii Agreement on Agriculture.

¹⁷⁸ Which deals with subsidies.

¹⁷⁹ Article 3 Subsidies Agreement deals with prohibited subsidies.

¹⁸⁰ Article 5 of the Subsidies Agreement provides for Actionable Subsidies, Adverse Effects.

¹⁸¹ Article 6 of the Subsidies Agreement provides for Actionable Subsidies, Serious Prejudice.

WTO Members did not decide to extend their application beyond that date”.¹⁸² Article 6.1 defines “serious prejudice” for the purposes of Article 5 SCM, while Article 8 deals with the identification of non-actionable subsidies, and Article 9, consultation and authorised remedies, the absence of which would change the essence of the SCM agreement, and make its operation more cumbersome. It should however be pointed out that the footnote to Article 32.1 SCM provides that “action under other relevant provisions of GATT 1994, where appropriate” is not precluded.

The extent, however, of all of the above further exposure, is a matter of debate, particularly in light of Article 21.1 of the Agreement on Agriculture, which provides that the “provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.” This provision, in itself, provides an exception to the general rules that “Annex 1A Agreements are deemed to apply cumulatively”,¹⁸³ following *Brazil - Measures Affecting Desiccated Coconut*, both panel¹⁸⁴ and Appellate Body rulings,¹⁸⁵ and *Argentina – Footwear*,¹⁸⁶ “even if there are distinctions between the drafting of the two positions”.¹⁸⁷ In reading the various agreements there is a “presumption against” a conflict¹⁸⁸ between two relevant agreements, as per *EC-Bananas*,¹⁸⁹ and *Canada-Periodicals*.¹⁹⁰ The reading of treaty provisions, as has been held in *Argentina - Footwear*,¹⁹¹ *Korea-*

¹⁸² Chambovey, Didier; “How the Expiry of the Peace Clause (article 13 of the WTO Agreement on Agriculture) Might Alter Disciplines on Agricultural Subsidies in the WTO Framework, J.W.T. 36(2): 302-352, 2002, at page 316.

¹⁸³ Ibid. at page 308.

¹⁸⁴ *Brazil- Measures Affecting Desiccated Coconut*, Report of the Panel, WT/DS22/R, 17 October 1996, para. 227.

¹⁸⁵ T/DS22/AB/R, 21 February 1997.

¹⁸⁶ *Argentina - Safeguard Measures on Imports of Footwear*, report of the Appellate Body, WT/DS121/AB/R, 14 December 1999.

¹⁸⁷ Op. cit footnote no. 182 at page 308.

¹⁸⁸ Ibid. at page 308.

¹⁸⁹ *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R, 9 September 1997.

¹⁹⁰ *Canada - Certain Measures concerning Periodicals*, report of the Appellate Body, WT/DS64/R, 2 July 1998.

¹⁹¹ Op. cit. footnote no. 186.

Dairy Products,¹⁹² and *Japan - Alcoholic Beverages*,¹⁹³ must be "consistent with the principle of effective interpretation of *l'effect utile*".¹⁹⁴ As stated in *US - Gasoline*¹⁹⁵ "an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a threat to redundancy or inutility".¹⁹⁶ As Chambovey points out,¹⁹⁷ the position of Article 21.1 of the Agreement on Agriculture was addressed by the Appellate Body in *EC – Bananas*,¹⁹⁸ though it has to be said, not in the context of Article 13 of the Agreement on Agriculture. The Appellate Body here held that the other Annex 1A agreements also applied to agricultural products, except to the extent that the Agreement on Agriculture had specific provisions dealing with a particular matter.¹⁹⁹ Chambovey has therefore interpreted this as the WTO Agreement on Agriculture operating as "a kind of *lex specialis*" in the WTO legal framework.²⁰⁰

Chambovey,²⁰¹ in his analysis of this situation, concludes that there are essentially two contrasting ways of operating the relationship between the Agreement on Agriculture and the other Annex 1A agreements. Under the first approach, he adopts a *lex specialis* framework for the Agreement on Agriculture, with the other Annex 1A agreements coming into play with regard to agricultural goods after the expiry of the peace clause, only to the extent that the Agreement on Agriculture does not specifically deal with the same specific matter. His second approach is to read both the Agreement on Agriculture and the balance of the Annex 1A agreements cumulatively at all times, with the documents to be read in such a way that those other Annex 1A agreements "are not reduced to

¹⁹² *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R. Report of the Appellate Body, 14 December 1999.

¹⁹³ *Japan - Taxes on Alcoholic Beverages (Japan-Alcoholic Beverages)*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate body, 1 November 1996.

¹⁹⁴ Op. cit. footnote no. 183, at page 308 et seq.

¹⁹⁵ Appellate Body report on *United States - Standards for Reformulated and Conventional Gasoline* (WT/DS2/ AB/R), adopted on 20 May 1996 (US-Gasoline), p.18.

¹⁹⁶ Op. cit. footnote no. 182, at page 309.

¹⁹⁷ Ibid at page 308.

¹⁹⁸ Op. cit. footnote no. 189.

¹⁹⁹ Op. cit. footnote no. 182, at page 309.

²⁰⁰ Ibid. at page 310 et seq.

²⁰¹ Ibid. at page 315.

inutility”.²⁰² Taking this second approach, he concludes that “the other Annex 1A agreements apply to agricultural products, ‘except to the extent that’”²⁰³ the Agreement on Agriculture contains conflicting provisions, either specifically or cumulatively, and that in such event WTO members would not then be “allowed to act inconsistently with the other Annex 1A Agreements, even if a measure in dispute has been adopted pursuant to or in accordance with the” Agreement on Agriculture.²⁰⁴

Steinberg and Jostling²⁰⁵ develop this analysis further, by adopting both legal theory and economic regression analysis to establish likely scenarios that could develop in the balance between the Agreement on Agriculture, the Agreement on Subsidies and Countervailing Measures, and GATT 1994, after the expiry of the Peace Clause, and in the absence of further multi-lateral agreements on this matter. Steinberg and Jostling determine that these agreements must be read cumulatively, following the cases of *Brazil-Desiccated Coconut*,²⁰⁶ and *Argentina- Footwear*.²⁰⁷ After discarding five possible routes for challenging agricultural subsidies after the peace period,²⁰⁸ the authors determine that the “most plausible legal theory” is a claim for “serious prejudice” under the SCM Agreement Article 5.c, through the operation of Articles 6.3(a) to (c.) and 6.4. The time limitation of the SCM provisions by Article 31 SCM is not addressed in this context. One must then prove this “serious prejudice”, in the absence of the Article 6.1 definition, as it has now expired pursuant to Article 31 SCM, in more

²⁰² Ibid. at page 309.

²⁰³ Ibid at page 309.

²⁰⁴ Ibid at page 316.

²⁰⁵ Steinberg, Richard H. and Jostling, Timothy E.; “When the Peace ends: the vulnerability of EC and US agricultural subsidies to WTO legal challenge”, JIEL, 2003, 6(2), 369-417, from page 371.

²⁰⁶ Op. cit. footnote no. 189, at paras 155-58.

²⁰⁷ Op. cit. footnote no. 186.

²⁰⁸ These being;

1. “Illegality of agricultural export subsidies under SCM Agreement Article 3
2. Non-violation nullification or impairment
3. A strategy based on countervailing duty cases
4. GATT 1994 Article XVI:2 – “more than equitable share of world trade”
5. Injury caused by subsidized import: a claim under SCM Agreement Article 5(a)”.
Steinberg, Richard H. and Jostling, Timothy E.; “When the Peace ends: the vulnerability of EC and US agricultural subsidies to WTO legal challenge”, JIEL, 2003, 6(2), 369-417, from page 343.

restricted circumstances than usual, in light of footnote number 17 of the SCM agreement. Footnote number 17 takes the Article 6.3.d test of “increase of world market share” out of the equation for agricultural commodities, which will also prove problematic. This is in addition to the traditional problem in agricultural trade where “correlations between subsidies and adverse effects may be hidden or weakened by the predominance of other factors affecting trade.”²⁰⁹ Article 1 SCM requires that these contributions are “specific” and “within the meaning of SCM Agreement Article 2,” be actionable.²¹⁰ Making a distinction between actionable and illegal, Steinberg and Jostling conclude that Articles 5 and 6 of the SCM Agreement “potentially may be applied to all types of agricultural subsidies addressed in the Agriculture Agreement”.²¹¹

If, according to Steinberg and Jostling’s analysis, the payments under the Agreement on Agriculture are actionable, the question arises if such payments are to be considered legal. While their conclusion that the “expiry of the Peace Clause was intended to have teeth so as to stimulate further agricultural reform negotiations”²¹² may well be true, and the possible consequences of said expiry “follow[s] the trend toward the integration of agriculture into the mainstream”²¹³ GATT provisions, whether the panels and the Appellate Body are now authorised to make such a move is questionable. It should be noted that while the Agreement on Agriculture contains within it quantitative pledges, there is no such provision in the SCM Agreement, with the SCM Agreement “defining the situations where a subsidy is flatly prohibited”.²¹⁴ Given this dichotomy of approach to subsidies in the two agreements, the cumulative application of these agreements, as argued for by both Chambovey, and Steinberg and Jostling, would lead to agricultural subsidies being “submitted to more rigorous rules” than those applicable to non-

²⁰⁹ Op. cit. footnote no. 205, at page 391.

²¹⁰ Ibid. at page 388.

²¹¹ Ibid. at page 388.

²¹² Ibid at page 399.

²¹³ Ibid at page 399.

²¹⁴ Op. cit. footnote no. 182, at page 310.

agricultural subsidies.²¹⁵ It should also be noted that Article 20.c of the Agreement on Agriculture non-trade concerns²¹⁶ should be taken into account in the “ongoing process” of the continuation of the reform process in the area of agriculture. Non-trade concerns “do not appear anywhere in the SCM Agreement”,²¹⁷ leading Chambovey at least, to conclude that it is extremely difficult to assume that agricultural commodities, at this stage, should be fully integrated into the GATT 94 and SCM rules, particularly as textiles, which were recently so integrated, has such integration specifically and expressly so provided for in their own agreement.²¹⁸

This area of law is currently ambiguous (with Sives²¹⁹ writing after Cancun shedding no further light on this particular issue), thereby bringing the principle of *in dubio mitius* into play. This principle was recognised as being part of WTO law by the Appellate Body in *EC – Hormones*.²²⁰ This principle originates from international law, and operates “in deference to the sovereignty of states”, whereby if a term, as is the case here with the various possible impacts of the Peace Clause, is ambiguous, then “that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties”.²²¹ An opportunity for the Appellate Body to bring clarity to the legal effect of the expiration of the peace clause arose in the recent *EC-Export Subsidies on Sugar case*.²²² As mentioned in chapter 5, the Appellate Body refused to examine the interaction of the SCM Agreement with the Agreement on Agriculture, as the original panel had failed adequately to address this issue. This

²¹⁵ Ibid. at page 310.

²¹⁶ Discussed further in chapter 8.

²¹⁷ Op. cit. footnote no. 182, at page 311.

²¹⁸ Ibid. at page 311.

²¹⁹ Sives, Humberto N.; The Expiry of the Peace Clause on Agricultural Export Subsidies – The Outlook Post-Cancun”, L.I.E.I. 31(1): 25-42, 2004, from page 25 et seq.

²²⁰ *EC Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, 13 February 1998, at para. 165.

²²¹ Op. cit. footnote no. 182, at page 310, footnote no. 22.

²²² *European Communities – Export subsidies on Sugar*, WT/DS265/29, WT/DS266/29, WT/DS283/10, 15th October 2004.

is, perhaps, a missed opportunity to give clarity to the impact of the expiration of the peace clause, in light of the above academic debate on the issue.

The impact of the expiration of the Peace Clause remains complex, given the particular tri-partite division of powers at the WTO, or the lack of such division, in some academic commentators' view point, taking into account Article 3.2 of the DSU, discussed earlier in this chapter, together with the requirement of the WTO dispute settlement mechanism to "preserve the rights and obligations of Members" ... "in accordance with customary rules of interpretation of public international law", foremost amongst those rules, the principle of *in dubio mitius*. It is perhaps fair to say that it is only at the end of the current round of negotiations that WTO members would be in a position to determine whether or not agricultural subsidies should be placed on an equal footing as any other subsidies.²²³ In the interim the importance of the expiry of the Peace Clause may perhaps be political, reflecting Jackson's "rule-orientation" rather than "rule-based" analysis of the WTO processes, with the current round of negotiations being conducted "in the shadow of its expiry", under threats from the likes of the Cairns group to litigate, in order to facilitate them, and like minded parties, obtaining agreement from both the US and the EC for further subsidy reduction.²²⁴ Whether the reform of the CAP by the EC, pursuant to the recent mid-term review, which is analysed in chapter 8, will be sufficient to avoid some of the more adverse consequences discussed above of the expiration of the Peace Clause also remains to be established.

²²³ Op. cit. footnote no. 182, at page 315 et seq.

²²⁴ Op. cit. footnote no. 205, at page 414.

5. Conclusion

At issue in this thesis is therefore two legal systems at different stages of evolution, with differing institutional²²⁵ and governance mechanisms.²²⁶ One of these legal systems operates on the basis of the rule of law, while the role of law in the other legal system, while clearly present, is more challenging to define. The role and operation of the dispute resolution system at the EC and the WTO level within the institutional framework also differs. In addition, the vision for the regulation of agriculture differs at the two levels,²²⁷ both in the provisions in the legal texts, but also in the underlying political philosophy as to the role of agriculture generally. That the WTO and the EC are interconnected legally is also clear, through the nexus of the EC's Common Commercial Policy,²²⁸ through legality control,²²⁹ and through the operation of the Trade Barrier Regulation.²³⁰ This connection, even in the absence of the recognition of the direct effect of WTO law within the EC jurisdiction, is both real and robust. The regulation of agriculture at the WTO is currently the subject of negotiations, and at the EC level has recently undergone reform pursuant to the mid-term review. The EC has not yet fully decoupled its payments to farmers from production, as evidenced by the continuing use of import and export licences, export refunds, import duties, tariff quotas and emergency safeguard measures being part of the post-mid-term review operation of the common organisation in cereals.²³¹ The expiration of the WTO Agreement on Agriculture's "Peace Clause"²³² will undoubtedly have an impact, with the failure to address the impact of this expiration in the *EC-Export Subsidies on Sugar case*,²³³ unlikely to be repeated. The allied issues to

²²⁵ As discussed in chapter 5.

²²⁶ As discussed in this chapter.

²²⁷ As discussed in chapter 2 for the EC, and chapter 4 for the WTO.

²²⁸ As analysed in chapter 3.

²²⁹ Discussed in chapter 6.

²³⁰ Discussed in chapter 6.

²³¹ As discussed in chapter 2.

²³² As discussed earlier in this chapter.

²³³ Op. cit. footnote no. 220.

international trade in international commodities currently regulated by the EC, discussed in chapter 3, will also feel the continuing impact of the WTO agreements. Complex as this situation would appear, further issues, such as competition law, services and intellectual property law, which will be analysed in chapter 8 all have a role to play in completing the picture of the impact of WTO agreements and case law on the EC regulatory framework in the area of agriculture. In addition the prospects for future developments, at both the EC and WTO level, some of which while attempting to resolve current problems in this area, may of themselves throw up further issues, addressed in chapter 8, with an attempt being made to come to a conclusion as to the legal relationship between the EC and the WTO in the area of agriculture in the final chapter, chapter 9.

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- 2. Changes to the EC**
- 3. Competition law and State Aids**
- 4. CAP reform and the emerging Rural Policy**
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 - 6.1 The Cartagena Protocol on Bio-Safety within the EC legal framework**
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12. Conclusion

1. Introduction

The interaction between the WTO's Agreement on Agriculture and the EC's CAP has to be understood in the context of its setting of the backdrop of other aspects of the WTO and EC legal framework. While some drawing of a line has to be made in order to distinguish between those aspects of the setting which have a greater and a lesser impact on the WTO-EC Agricultural law dynamic, those aspects which have a greater impact on this legal relationship will be analysed in this chapter. Of interest is the interaction of the EC's CAP with the EC's Competition policy, a complex interaction, given the differing relationship between these two EC policies depending on the existence of a common organisation in a particular product area. This complex dynamic then has to be juxtaposed against the lack of any competition policy at the WTO level. The WTO state aids provisions, mediated through the WTO Agreement on Agriculture for agricultural products, given the exemption from the GATT provisions on subsidies for primary products, pursuant to Article XVI GATT, restrict both EC and national state aid provision in agriculture, with national state aid provision applying not only in limited non-common organisation situations, but also re-emerging with the restructuring of the EC's CAP under both the mid-term review and the proposed changes under the EU Constitution.

The restructuring of the CAP in order to meet the EC's WTO commitments in agriculture is seeing a re-focusing on the pre-existing emerging EC Rural policy, with its allied environmental issues. While the EC is adjusting its CAP in order to be WTO compliant, it may be manoeuvring itself into a situation where its Sixth Environmental Action Programme, together with its concept of an Integrated Product Policy, may become the new bone of contention

between the EC and the WTO. Allied to this is the thorny issue of the legal interaction of the Cartagena Protocol on Bio-safety with both the EC and the WTO legal regimes, particularly in light of the absence of any agreement dealing with environmental matters at the WTO.

The issues of health and consumer protection are never far from the discourse on agricultural and food products, with both the EC and the WTO having developed policies on this area, with the WTO's Sanitary and Phytosanitary (SPS) Agreement and the Technical Barriers to Trade (TBT) Agreement coming into the fray. In addition the Trade Related Aspects of Intellectual Property Agreement (TRIPs) and the General Agreement on Trade in Services (GATS) complete the set of WTO agreements which have a major impact on the legal relationship between the EC and the WTO in the area of agriculture.

In addition in examining the future development of the nexus between EC Agricultural Law and WTO law the evolving nature of both the EC and the WTO have to be taken into consideration. The EC itself may well be subject to reform under the proposed EU Constitution, which at the time of writing has entered difficult political waters, but which may, at some time in the future re-emerge, either piecemeal or intact. The reforms of CAP mid-term review, while radical, (leading one to speculate what changes the "end of term review" will lead to), do not yet meet all of the requirements of the WTO Agreement on Agriculture, but may yet, with their refocusing on rural and environmental issues, encounter further problems at the WTO level, with other WTO agreements. At the global level the WTO is also hosting the Millennium round of negotiations, which should in due course lead to either a new WTO Agreement on Agriculture, or reforms to the existing one.

2. Changes to the EC

The EC for its part is, subject to referenda, about to be transformed into the European Union (not to be confused with the current three pillar structure of the European Union pursuant to the Treaty on European Union 1993). The term “constitutional” being used for the “Constitution of the European Union” has been regarded as being “legally meaningless” by academics, as “any text finally agreed by the Member States was to take the form of a treaty with the same status as all previous Union treaties”.¹ At the time of writing, however, the position of the EU Constitution is in somewhat of a limbo, having been rejected in two consecutive referenda, in France and the Netherlands, with the term “constitution” having been more than problematic in those referenda. As with many previous EU proposals, having reached an initial political impasse, the Constitutional Treaty may well re-emerge at some later stage, either in its entirety, or in a piecemeal fashion. It is therefore worth examining the potential future impact of the provisions of this troubled EU Constitution on the subject matter of this thesis.

The EU Constitution, should it ever come into force, will bring some changes to the organisation that we have come to know as the EC. Legal personality will be allocated to the new EU under Article I-7 EU, with the Charter of Fundamental Rights of the EU being written into Part II of the Constitution. The exact legal effect of this development, and of the “Court of Justice”,² the new umbrella institution,³ which will encompass within it the familiar ECJ,⁴ the new General Court (replacing the Court of First Instance),⁵ and the possible “specialised courts” (formerly known as judicial panels),⁶ to whom capacity to adjudicate may

¹ Arnall, Anthony; Editorial: The Presidents’ Tale, *E.L. Rev.* 2004, 29(1), 1-2, at page 1.

² Under Article I-29(1) EU Treaty.

³ Dougan, Michael; The convention’s draft constitutional treaty: bringing Europe closer to its lawyers, *E.L. Rev.* 2003, 28(6), 763-793, at page 780.

⁴ Article III-353 EU

⁵ Article III-356 EU

⁶ Article III-359 EU

be assigned⁷ (by the EU Constitution, to the General Court, or by a European Law, to the specialised courts), has yet to be established.

On an initial reading, Part II of the EU Constitution appears to replicate the provisions of the current Charter of Fundamental Rights of the European Union,⁸ with the change in legal status of its content to being part of the underlying treaty of the new EU having yet to be established, through an analysis of the case law of the new Court of Justice on this matter. The abandonment of the familiar secondary legal tool of regulation, directive and decision, in favour of the new European Laws, European Framework Laws, European Regulations and European Decisions,⁹ will however alter the dynamic of the current EC, and future EU law generally, begging the question how the EU judicial structure will react to these developments.

On a re-examination of the allocation of competences between the EU and its member states the Constitution has retained the central principle that the EU operates on the basis of “attributed competence”,¹⁰ with the “general tendency” being to “reinforce EU power”, rather than repatriating it to its member states.¹¹ The barriers between the areas of exclusive and shared competence has, however, “shifted significantly”,¹² with the re-categorisation of powers likely to give rise to “real difficulties”.¹³ The EU Constitution has classified the customs union, and the common commercial policy under the area of exclusive EU competence,¹⁴ further providing that the Union is to have exclusive competence to conclude “an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence,

⁷ Pursuant to Article III-358 EU.

⁸ OJ 2000 C364/01, otherwise known as the Nice Charter.

⁹ Article I-33 EU

¹⁰ Craig, Paul; Competence: Clarity, Conferral, Containment and Consideration. *ELRev.* 2004, 29(30), 323-344, at page 324.

¹¹ *Ibid.* at page 326.

¹² *Ibid.* at page 326.

¹³ *Ibid.* at page 326.

¹⁴ Article I-13 EU.

or insofar as its conclusion may affect common rules or alter their scope”.¹⁵ The EU Constitution has classified under shared competence¹⁶ *inter alia*, the internal market and “agriculture and fisheries, excluding the conservation of marine biological resources”.¹⁷ Also under this classification are the environment, consumer protection and common safety concerns in public health matters, for the aspects defined in Part III of the EU Constitution. The “protection and improvement of human health” is classified as an “Area of supporting, coordinating or complementary action”,¹⁸ with Article I-17 not being useable “to achieve harmonisation in cases where this is precluded by the Constitution”.¹⁹ This drafting will result in a shifting of the line of tension between the EU’s exclusive external competence and areas of shared competence for internal EU matters and the current lack of clarity being carried forward to a post-EU Constitution legal framework.

In addition to the reclassification of exclusive and shared competence within the Constitution, the issue of subsidiarity remains problematic in the new document. Subsidiarity has been addressed by the EU Constitution in Article I-11, together with a protocol attached to the Constitution.²⁰ Article I-11 refers to the principle of conferral being the governing principle of the limits of the Union’s competences with ‘the use of the Union’s competences’ to be ‘governed by the principles of subsidiarity and proportionality’. While both subsidiarity and proportionality are familiar concepts, the conferral principle, despite the new name, also appears to offer little that is new to the analysis of the law in this area. Much of Article I-11 looks familiar, although the reference to whether an action can be sufficiently achieved by a Member State, in paragraph 3 of this article, refers to ‘either at central level or at regional and local level’, adding a new layer of governance for the post-Constitution EU principle of subsidiarity. The protocol

¹⁵ Article I-13 EU.

¹⁶ Article I-14 EU.

¹⁷ Marine biological resources conservation is classified as exclusive competence under Article I-14 EU.

¹⁸ Under Article I-17 EU.

¹⁹ Op. cit. footnote no. 10, at page 341.

²⁰ Protocol on the Application of the Principles of Subsidiarity and Proportionality.

on the application of the principles of subsidiarity and proportionality builds on the principles provided for in earlier EC/EU documentation,²¹ providing for procedural mechanisms, involving national parliaments, for the operation of the principle. As stated by Craig, however, ‘it remains to be seen how subsidiarity and the Protocol operate in practice’.²²

While some of the boundary lines between the member states of the new EU, and the EU itself, and the legal relationship between the new EU and the WTO will be affected by the EU Constitution, the issue of the exact impact of WTO agreements and “case law” on the EC, or the proposed new EU legal jurisdiction have been avoided by the Constitution drafters and remain to be resolved through further ECJ jurisprudential developments. It should be noted, in the context of dealing with the future of the WTO/EU relationship that current core Article 133 EC provisions, although extended to cover new policy areas, would be substantially re-enacted in Article III-315 of the EU Constitution. Of note, however, in this article is the provision that the CCP “shall be conducted in the context of the principles and objectives of the Union’s external action”, perhaps bringing what is now the EC’s Commercial Policy within the framework of the EU’s foreign policy, as the “three-pillar-plus-pediment structure” of the original EU has been demolished,²³ with the CFSP together with the PJCCM pillars being brought into the unitary structure of the new EU, however with differences that the new Union method within the proposed new “unitary” Union structure.²⁴ Whether this results in the new EU developing its trade policy as an international foreign policy tool, along the lines of that adopted by the USA, has yet to be established. The EU Constitution does not, of itself, resolve the problematic relationship between what is now the EC and the WTO, which, given the changes that have been written into the legal framework, could be seen as a missed opportunity to bring greater clarity to this area. Article I-13(2) does

²¹ Op. cit. footnote no. 10, at page 342.

²² Ibid. at page 343.

²³ Op. cit. footnote no. 3, at page 764.

²⁴ Ibid., at page 764.

provide that international agreements the conclusion of which are “provided for in a legislative act of the Union”²⁵ are deemed to be within the exclusive competence of the Union with “little containment of EU power” in this area.²⁶

How the new “Court of Justice” would interact with the provisions of the Constitution would also have to be established, although it would appear that the legal relationship between EC law and WTO law within the EC, or future EU jurisdiction, has been definitively ruled on in the *Van Parys* case,²⁷ reaffirming *Portugal v. Council*,²⁸ ignoring the Advocate General’s creative opinion in the *Biret* case,²⁹ a full discussion of which was held in chapter 6. While some writers would argue that the ECJ has not been shy of developing law when it felt the need to do so, as in the development of the Treaty of Rome itself, converting a traditional multilateral treaty³⁰ into a constitutional charter governed by a form of constitutional law,³¹ it is to be expected that the new “Court of Justice” will desist from deviating from the *Portugal v. Council* line, and maintain its accommodation line to WTO law as discussed earlier in chapter 6.

3. Competition law and State Aids

Most readers of national newspapers, let alone legal texts, would be aware that the EC has a vigorous Competition law policy, or using the US terminology, anti-trust policy, as set out in Articles 81 and 82 EC.³² The application of this policy, based on the concepts of anti-competitive behaviour and “abuse of a

²⁵ Ibid. at page 768.

²⁶ Op. cit. footnote no. 10, at page 330.

²⁷ Case C-377/02, *Leon Van Parys NV v Belgisch Interventie- en Restitutiebureau (BIRB)*, [2005] ECR I-01465.

²⁸ Case C-149/96: *Portuguese Republic v Council of the European Union*, [1999] ECR at page I-08395.

²⁹ Cases C-93/02, and C-94/02, *Biret International SA v. Council of the European Union*, [2003] ECR page I-10497.

³⁰ Mancini, G. Federico “The Making of a Constitution for Europe” (1989) 26 C.M. L. Rev. 595-614, at page 595 et seq.

³¹ Weiler, J.H.H.; *The Reformation of European Constitutionalism*, JCMS, Vol 35, No1, page 97.

³² Formerly Articles 85 and 86 EC.

dominant position”, do not necessarily apply to agricultural activities, due to the impact of Article 36 EC, which provides that the EC treaty provisions on competition law will apply to “production of and trade in agricultural products only to the extent determined by the Council” after having taken account of the objectives of the EC’s CAP as set out in Article 33 EC. The Council did so determine the extent to which mainstream EC Competition law was to affect agriculture, in Council Regulation 26/62,³³ which, subject to one amendment,³⁴ and two derogations,³⁵ remains the law today. Council Regulation 26/62 provides exemptions from the provisions of Articles 81 and 82 EC,³⁶ on the basis of the *Oude Luttikhuis*³⁷ tests, which include agreements necessary for attainment of the objectives set out in Article 33 of the Treaty,³⁸ which should cover the reforms of the CAP under the mid-term review,³⁹ and developments pursuant to the currently developing Pillar II of CAP, pursuant to the EC’s view of the multifunctionality of agricultural activity, of which more later in this chapter.

As referred to in chapter 2 the EC definition of “agricultural products” as provided for in Article 32 EC, being “products of the soil, of stockfarming and of fisheries and products of first stage processing directly relating to these products”, is broader than the WTO definition, the WTO definition being the one being used throughout this thesis. Article 32 EC is complemented by Council Regulation 7a EC.⁴⁰ The definitions of agricultural producers and agricultural holdings, for the purposes of EC law, are not, however, set out in the Treaty, with the ECJ finding,

³³ Council Regulation No. 26 applying certain rules of competition to the production of and trade in agricultural products, OJ L 30, 20/4/62, p. 993.

³⁴ Dealing with the dates of its coming into force.

³⁵ Affecting, respectively, the recognition of inter-branch organisations in the tobacco and the fruit and vegetable sectors.

³⁶ And presumably will continue to provide protection under the post EU constitution regime, although this has yet to be confirmed.

³⁷ Case C-399/93, *J.G. Oude Luttikhuis and others v. Verenigde Cooperatieve Melkindustrie Coberco BA.*, [1995] ECR, page I- 4515.

³⁸ To be interpreted pursuant to the ruling in Case 71/74 *Nederlandse Vereniging voor de fruit- en groentenimporthandel, Nederlandse Bond van grossiers in zuidvruchten en ander geïmporteerd fruit Frubo v. Commission of the European Communities and Vereniging de Fruitunie*. [1975] ECR 563.

³⁹ Despite the dismantlement of the common organisations of particular agricultural commodities.

⁴⁰ OJ 1961, p. 71 (Sp. Edn 1959-1962, p. 68).

at paragraph 8 of the judgment in the case of *Santa Anna*,⁴¹ that “it is for the Community institutions to work out, where appropriate, for the purposes of the rules deriving from the Treaty such a definition of agricultural holding”, given that it is “impossible to find in the provisions of the Treaty or in the rules of secondary Community law” any such “general uniform Community definition”. Farmers have, however, only recently been defined in Article 2(a)⁴² of Council Regulation (EC) No 1782/2003⁴³ for the purposes of the new direct support scheme.

The interaction of the EC Competition policy with the CAP was addressed in the case of *Dijkstra*,⁴⁴ which held that the then Article 85 EC (now Article 81 EC) does not apply to “agreements, decisions and practices of farmers, farmers’ associations or associations of such associations” only where the “conditions laid down in the second sentence of Article 2(1) of Regulation No. 26” apply. If any such agreements do not comply with these conditions, then the exemption from EC competition law cannot be claimed, and the full rigours of the then Article 85 EC, as originally implemented by Regulation 17/62,⁴⁵ and now by Regulation 1/2003,⁴⁶ will apply. If the agreement, in such a circumstance, failing to meet the requirements of Regulation 26, “does not qualify for exemption pursuant to Article 85(3)” (now Article 81(3)) then the agreement is “automatically void and

⁴¹ Case 85/77 *Santa Anna v. INPS* [1978] ECR 527.

⁴² Article 2(a) provides that “‘farmer’ means a natural or legal person, or a group of natural or legal persons, whatever legal status is granted to the group and its members by national law, whose holding is situated within Community territory, as referred to in Article 299 of the Treaty, and who exercises an agricultural activity”.

⁴³ Council Regulation (EC) No 1782/2003 of 29th September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No. 2019/93, (EC) No. 1452/2001, (EC) No. 1453/2001, (EC) No. 1454/2001, (EC) 1868/94, (EC) No 1251/1999, (EC) No. 1254/1999, (EC) No. 1673/2000, (EEC) No. 2358/71 and (EC) No. 2529/2001, OJ L 270/1.

⁴⁴ Joined Cases C-319/93, C-40/94 and C-224/94 *Hendrik Everit Dijkstra Friesland (Frico Domo) Cooperatie BA and Cornelis van Roessel and others v. De Cooperatieve vereniging Zuivelcooperatie Campina Melkunie BA*, [1995] ECR page 4471.

⁴⁵ EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, Official Journal L 13, 21/02/1962 p. 204.

⁴⁶ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L 1/1 4.1. 2003.

such nullity has retroactive effect”.⁴⁷ In addition it should be noted that Regulation 26 has no exemptions for Article 82 abuse of dominant position, an issue which was to come to fore in the context of agriculture in the *United Brands* case.⁴⁸ The granting of licences, a service, by a party in a dominant position, also became relevant in the WTO case of *EC-Bananas*,⁴⁹ of which more later in the context of services.

The current thinking of the ECJ on the requirements of Regulation 26 was set out in the case of *Oude Luttikhuis*.⁵⁰ This ruling provided that the general rule in dealing with all competition law issues pursuant to the provisions of the now numbered Articles 81 and 82 EC, as implemented, and that Regulation 26, applying to agriculture, was to be a strictly interpreted exception. The Court went on to say⁵¹ that three derogations from the general rule provided for in Regulation 26 were as follows; first, agreements in the context of a national market organization, second, agreements necessary for attainment of the objectives set out in what is now Article 33 of the Treaty,⁵² and the cumulative third test. For the third derogation to apply, the Court held that the following requirements had to be met: first, “the agreements in question concern cooperative associations belonging to a single Member State”, second, that they do not cover prices but concern rather the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of such products”, and third, that “they do not exclude competition or jeopardize the objectives” of the CAP. The second test, “agreements necessary for attainment of the objectives set out in Article 39 [now Article 33] of the Treaty”, provides for a complex test, given, as set out in chapter 2, the objectives of the CAP are quite often conflicting, leading to the issues raised in the current multifunctionality debate, referred to also in chapter 2.

⁴⁷ At paragraph 1 of the ruling of the ECJ in *Dijkstra*.

⁴⁸ Case 27/67 *United Brands v. Commission* [1978] ECR 207.

⁴⁹ *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R, 9 September 1997.

⁵⁰ Op. cit. footnote no. 37.

⁵¹ At paragraph 23 of the judgment.

⁵² To be interpreted pursuant to the ruling in Case 71/74 *Nederlandse Vereniging voor de fruit- en groentenimporthandel, Nederlandse Bond van grossiers in zuidvruchten en ander geïmporteerd fruit Frubo v. Commission of the European Communities and Vereniging de Fruitunie* [1975] ECR 563.

An example of the restrictive interpretation of Regulation 26/62 is the *Goettrup-Kilm* case,⁵³ where it was held by the ECJ that restrictive practices in the area of fertilizers and plant protection products were not within the agricultural exception to the mainstream EC competition rules, as set down in Article 36 EC, and in Regulation 26/62. In this specific case, however, it was further held that restrictive provisions on the acquisition of goods by members of a cooperative purchasing association were not to be held in breach of Article 81 EC, “so long as the abovementioned provision is restricted to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.”⁵⁴ This interpretation would appear further to blur what otherwise should be clear demarcation boundary lines between the CAP and EC Competition law, in favour of the CAP.

The impact of this derogation from mainstream EC Competition law in the area of agriculture, with the CAP traditionally focused on “common price”, has “severely restricted price competition”.⁵⁵ However with the decoupling provisions announced in the mid-term review,⁵⁶ and being implemented by Regulation 1782/03,⁵⁷ with the “current moves to producer support” rather than price support, may restrict the negative impacts of the agricultural derogation to competitive market forces.⁵⁸ However, even under the pre- mid term reform framework it was “not permissible” further to “restrict the degree of competition” available to agricultural undertakings as evidenced in the *Suiker Unie*⁵⁹ case.⁶⁰

⁵³ Case C-250/92, *Goettrup-Kilm e.a. Grovvareforeningr v. Dansk Landbrugs grovvareselskab AmbA.*, [1994] ECR page I-5641, at paragraph 27 of the judgment et seq.

⁵⁴ At paragraph 2 of the ruling.

⁵⁵ Usher, J.A.; *EC Agricultural Law*, 2nd edition, Oxford University Press, 2001, at page 14.

⁵⁶ To be discussed further in chapter 9.

⁵⁷ Op. cit. footnote no. 43.

⁵⁸ Op. cit. footnote no. 55, at page 14.

⁵⁹ Cases 40-48, 50, 54-56, 111, 113, 114/73 *Suiker Unie v. Commission* [1975] ECR 1663 at 1949, 1950.

⁶⁰ Op. cit. footnote no. 55, at page 14.

Under EC law the rules on state aids form part of EC Competition law, as the EC concerns itself not only with the actions of private actors but also of states. Council Regulation 26/62 applies what are now Articles 88(1) and the first sentence of 88(3) to agricultural products,⁶¹ but not the balance of Article 88 EC,⁶² the operative part of the state aids provisions. Those agricultural products not covered by common organizations⁶³ are “not subject to the substantive state aid rules”.⁶⁴ As pointed out by Usher, relying on the *Societe d’Initiatives* case,⁶⁵ where no common organisation operates, there is still “no general application of the state aids rules to agricultural products”.⁶⁶ Where the common organisation had more rigorous provisions on state aids than under the EC treaty provisions then the more rigorous common organisations provisions were to apply.⁶⁷ In the absence of the application of EC state aid provisions then the Council was in a position to “authorize a national aid”.⁶⁸

Within the common organisation, Article 34.2 EC expressly provides for “aids for the production and marketing of the various products,” although the common organisation shall be limited to the pursuit of the objectives set out in Article 33, and shall exclude any discrimination between producers or consumers within the Community”, with research and training aid being provided for in Article 35 EC, and Article 36 providing for the authorisation by the Council of “the granting of aid (by Member States): (a) for the protection of enterprises handicapped by structural or natural conditions; (b) within the framework of economic development programmes”. The granting of aid by the EC itself to agricultural producers, the standard method of the operation of the CAP, needless

⁶¹ Article 4 of Council Regulation 26/62, OJ L. 30, 20/04/1962, p.993.

⁶² Which presumably will be substituted by Article III-168 of the new EU Treaty, which substantially re-enacts the provisions of Article 88 EC.

⁶³ These according to Usher, (Op. cit. footnote no. 56, at page 16) relying on the Commission’s “Community Guidelines for state aid in the agriculture sector, February 2000, as, “potatoes (other than starch potatoes) horsemeat, honey, coffee, alcohol of agricultural origin and vinegars derived from alcohol, and cork”. (OJ 2000, C232/17).

⁶⁴ Op. cit. footnote no. 55, at page 16.

⁶⁵ Case 114/83 *Societe d’Initiatives et de cooperation Agricoles v. Commission* [1984] ECR 2589.

⁶⁶ Op. cit. footnote no. 55, at page 17.

⁶⁷ As was held in the *Case 177/78 Pigs and Bacon Commission v McCarren*, [1979] ECR 2161.

⁶⁸ Op. cit. footnote no. 55, at page 17.

to say, is not prohibited by the EC treaty. These provisions, when read together, and elaborated upon by the myriad of various implementing provisions, paint a completely different picture from that set out for non-agricultural produce under Article 87 EC. While certain exceptions to this rigorous rule are provided for in Article 87.2, the clear picture is that while discrimination between undertakings is prohibited for both agricultural and non-agricultural aids, the emphasis on competition and trade distortion in the context of favouring particular goods, for non-agricultural produce, is not mirrored in the agricultural sector. This dichotomy in approach will have an effect on the interaction of the EC's CAP with the WTO Agreement on Agriculture, given the lack of provisions within the current WTO regime for competition law together with the WTO Agreement's on Agriculture's restrictive provision on state aids.

National state aids could exist for non-common market products; however, intra-EC countervailing duties may still be imposed in such a situation, under Article 38 EC, with the Commission, and not individual member states, fixing "the amount of these charges at the level required to redress the balance", in addition to other possible measures which "it shall determine". It is possible that national state aid provisions continue to exist, which may be authorised by the Council, "in the context of a common organisation".⁶⁹ However, in the absence of such authorisation, the EAGGF in particular, pursuant to the case of *France v. Commission*,⁷⁰ may "legitimately refuse to finance a Community aid" in such circumstance.⁷¹ National export subsidies may not however be provided where the agricultural product is subject to an EC common organisation.⁷²

As a consequence of this situation, the line of argument developed that national organisations of agricultural markets could "no longer operate in such a way as to prevent the Treaty provisions relating to the elimination of restrictions

⁶⁹ Ibid. at page 17.

⁷⁰ Cases 15, 16/76 *France v Commission* [1979] ECR 321.

⁷¹ Op. cit. footnote no. 55, at page 17.

⁷² Ibid. at page 20.

on intra-Community trade from having full force and effect,”⁷³ with Article 32 EC being deemed to permit “countervailing charges to be imposed where national support measures give rise to low-priced (and presumably subsidized) exports”.⁷⁴ While Usher is of the opinion that the “continued use of Art. 38” might be seen as incompatible with the post-1992 vision of an internal market without frontiers,⁷⁵ an interesting situation can be seen to be emerging due to two recent developments within the EC. The mid-term review, with its deconstruction of common organisations, due to the decoupling of payments to farmers from production, and the use of the single farm payment, a more developed policy in some parts of the EC than in others, and in certain commodities, than in others, will lead to a greater increase in the numbers of agricultural commodities not covered by common organisation based state aid rules, thus increasing the number of commodities in the default position of only being governed by the limited provisions of Article 88, or Article III-168 of the new EU Constitution, pursuant to Article 4 of Regulation 26/64, which presumably will continue in force in a post EU Constitution era, should the Constitution or the relevant parts of it come into force. Secondly, while recognising that both the EC and its constituent member states are bound by the commitments in the WTO Agreement on Agriculture, the reclassification of agriculture in the new EU Constitution as being an area of shared competence between the EU and its member states, pursuant to Article I-14 EU⁷⁶ thereby becoming subject to the principle of subsidiarity, will also increase the likelihood of the development of national state aids, either through direct, or indirect means. This will be despite the fact that Council Regulation 1257/1999 “in principle applies the state aid rules to national measures to support rural development”,⁷⁷ thereby covering developments under Pillar II of CAP.

⁷³ Case 232/78, *European Commission v. France*, ECR 1979, page 2729.

⁷⁴ Op. cit. footnote no. 55, at page 18.

⁷⁵ Ibid. at page 19.

⁷⁶ as discussed in detail earlier in this chapter.

⁷⁷ Op. cit. footnote no. 55, at page 19.

The Commission's view is that state aid provisions, subject to any specific exceptions, are fully applicable to agricultural⁷⁸ and rural sector activities "with the exception of those aids which are specifically aimed at the limited number of products which are not covered by common organisations of the market".⁷⁹ Allied to this the fact that the "*de minimis*"⁸⁰ rule⁸¹ does not apply to agricultural aid,⁸² and the financing of any rural policy activity by the state becomes a delicate operation. In addition, it should be noted that aids to promote diversification activities, which are within the Rural Development regulation,⁸³ but which are not concerned with the "the scope of the production, processing and marketing of Annex I⁸⁴ agricultural products,"⁸⁵ are to be treated as if they are outside the specific agricultural provisions, as mainstream state aids, thereby benefiting from the "*de minimis*" rule.⁸⁶ It should also be noted at this point that Article 6 EC, which applies to both the agricultural and non-agricultural sector, requires "environmental protection requirements" to be "integrated into the definition and implementation" of all Community policies, including state aids.⁸⁷ This complexity is added to when one considers the WTO Agreement on Agriculture's restrictive provisions on state aids, colloquially referred to as green, blue, and red box provisions, (in contrast to the GATT 1947's non-application of the provisions of Article XVI subsidies provisions to primary products), as elaborated upon in chapter 4.

⁷⁸ Regulation 26/62 OJ 1962, 993, provides that the competition rules and state aid rules are to apply to the Agricultural sector except where a common organisation operates. These state aids may however be subject to Articles 88(1) and (3), which deal with constant review by the Commission, and the informing of the Commission. The Commission then "cannot oppose the granting of such aids, although it may submit its comments" on such aid. "Information from the Commission – Community Guidelines for State aid in the agriculture sector, OJ C 28, 1/2/2000, page 2 to 22.

⁷⁹ Information from the Commission – Community Guidelines for State aid in the agriculture sector OJ C 28, 1/2/2000, page 2 to 22.

⁸⁰ *De minimis non curata lex* – the law does not cure minor breaches.

⁸¹ Commission Notice on the *de minimis* rule for State aid, OJ C, 68, 6,3,1996, page 6.

⁸² Op. cit. footnote no. 79, page 2 to 22.

⁸³ Council Regulation (EC) No. 1257/1999 OJ L. 106, 26/6/1999, p.80, at Article 4.

⁸⁴ Annex 1 of the EC Treaty.

⁸⁵ Not being covered by the Commission Guidelines on State Aids in the Agriculture sector, OJ C 28, 1/2/2000, page 2 to 22.

⁸⁶ Op. cit. footnote no. 82, at pages 2 to 22.

⁸⁷ Op. cit. footnote no. 55, at page 16.

These exemptions from mainstream EC Competition law and from the state aids provisions for agriculture have had a profound effect on the development of the market place for agriculture. It is worth noting that the emphasis of the CAP has traditionally been the protection of farmers, while, as stated by the OECD, "Competition law protects competition, not competitors".⁸⁸ Competition law provisions are currently absent from the WTO legal framework, however under the current round of WTO negotiations a working group had been set up⁸⁹ to examine the "interaction between trade and competition policy" to cover anti-competitive practices, and to "identify any areas that may merit further consideration in the WTO framework".⁹⁰ The workings of this group, were not, however, to "prejudge whether negotiations will be initiated in the future".⁹¹ While the declaration makes reference to UNCTAD work in this area, it is clear that no new regimes on competition law will be forthcoming from the current round of WTO negotiations,⁹² as "multilateral disciplines in these areas.. will take place only after an explicit consensus decision is taken among WTO Members" to that effect.⁹³ This is reflected in the fact that in July 04 negotiations on Competition law during the Doha round of negotiations were abandoned. There were a number of issues which may have hindered the development of a WTO agreement on this issue, not least of which, "only 90 or so of the WTO's members have competition regimes" most of which "are of recent vintage".⁹⁴ In addition it has been recognised that in the area of trade and competition "one size does not fit

⁸⁸ OECD, *Trade and Competition from Doha to Cancún*, OECD, 2003, ISBN/ISSN 9264102787, at page 9.

⁸⁹ This working group was established at the Singapore Ministerial Conference in December 1996 (<http://www.wto.org>).

⁹⁰ World Trade Organisation: Ministerial Conference, Singapore, 9-13 December 1996, Singapore Ministerial declaration, Adopted on 13 December 1996, at point 20 of the declaration.

⁹¹ Ibid. at point 20 of the declaration.

⁹² Although developments at the OECD Joint Global Forum on Competition, which is still ongoing, might be worth following for early indications of possible future directions in this area.

⁹³ World Trade Organization: Ministerial Conference, Singapore, 9-13 December 1996, Singapore ministerial declaration, Adopted on 13 December 1996, at point 20 of the declaration.

⁹⁴ Nottage, Hunter; "Trade and Competition in the WTO", *Pondering the applicability of special and differential treatment*; *Journal of International Economic Law* (2003) 23-47, at page 41.

all”, with differentiated treatment not just for developing countries,⁹⁵ but also recognising that “even within the most industrially advanced nations” there are “different policy goals and objectives of competition regimes”.⁹⁶ The working group was therefore to focus on “specific trade policy issues” rather than looking at the broader picture”.⁹⁷ While some competitive provisions are currently in some WTO agreements⁹⁸ none would currently impact on the WTO agricultural regime.

4. CAP reform and the emerging Rural Policy

4.1. Introduction

As referred to earlier, with the recent reform of pillar I of CAP under the mid-term review, an allied policy to the EC’s CAP is the emerging European Rural Policy, often referred to, but not exclusively envisaged as, the second pillar of CAP, and the longer standing EC Environmental Policy. Both of these policies will increasingly inform the future development of the CAP, particularly in light of the cross compliance requirements under the mid term review⁹⁹ of the CAP, and the requirement of farmers to meet the “good agricultural and environmental condition” (GAEC) in order to qualify for the direct payments.

4.2 Mid-term review

As referred to in chapter 7, CAP reform has commenced pursuant to Council Regulation (EC) No. 1782/2003¹⁰⁰ subsequent to the completion of the

⁹⁵ Ibid. at page 43.

⁹⁶ Robertson, Aidan; Book review “K.Kennedy; Competition Law and the World Trade Organisation, ECLR 2002, 23(2), 113-114, at page 114.

⁹⁷ <http://www.wto.org>.

⁹⁸ With both GATT and GATS having provisions dealing with “monopolies and exclusive service providers” with further details in the telecommunications provisions Op. cit. footnote no. 188.

⁹⁹ Op. cit. footnote no. 43.

¹⁰⁰ Ibid.

mid-term review. Under the new regime, which commenced in January 2005 with a single farm payment (SFP) to “replace most of the existing premia under the different common market organisations”.¹⁰¹ Farmers¹⁰² in receipt of the SFP will have the flexibility to “produce any crop on their land, except fruit and vegetables and table potatoes”,¹⁰³ subject to the requirement to keep their land in “good agricultural and environmental condition”.¹⁰⁴ The SFP is to be calculated on the basis of “historical reference amounts” comprising “the calendar years 2000, 2001 and 2002”.¹⁰⁵ Member state options, to include national and regional differentiation options, have been written into the Council Regulation, to permit *inter alia*, the commencement of the SFP by the beginning of 2005, or at the latest, 2007. It should be noted that certain commodities, such as olive oil, tobacco, hops and cotton have not been reformed under the mid-term review, still requiring separate reform measures to be drafted.¹⁰⁶ The reform of the EC’s sugar policy will come into force in July 06, bringing it in line with the rest of CAP. Sugar, in particular, requires reform pursuant to the recent WTO Appellate Body joint ruling on three cases dealing with the EC’s sugar regime.¹⁰⁷ In these cases the Appellate Body ruled, *inter alia*, that the EC sugar regime was inconsistent with the EC’s “obligation under Articles 3.3 and 8 of the Agreement on Agriculture”¹⁰⁸ and recommended that the “Dispute Settlement Body request the European Communities to bring Council Regulation (EC) No. 1260/2001, as well

¹⁰¹ OECD: Analysis of the 2003 CAP reform, OECD, 2004, at page 10.

¹⁰² Now defined in Council Regulation (EC) No 1782/2003, Article 2 (a) as being “a natural or legal person, or a group of natural or legal persons, whatever legal status is granted to this group and its members by national law, whose holding is situated within Community territory, as referred to in Article 299 of the Treaty, and who exercises and agricultural activity”. Agricultural activity is itself defined in Article 2(c.) as being “the production, rearing or growing of agricultural products including harvesting, milking, breeding animals and keeping animals for farming purposes, or maintaining the land in good agricultural and environmental condition”. Agricultural products are defined in Article 2(f) as being “products listed in Annex I of the Treaty, including cotton, but with the exception of fishery products”.

¹⁰³ Op. cit. footnote no. 101, at page 11.

¹⁰⁴ Article 5 Council Regulation (EC) No. 1782/2003, OJ L 270/1.

¹⁰⁵ Article 38 Council Regulation (EC) No. 1782/2003, OJ L 270/1.

¹⁰⁶ Op. Cit. footnote no. 101, at page 9.

¹⁰⁷ *European Communities – Export subsidies on sugar (brought by Australia)* WT/DS265/AB/R, *European Communities- Export subsidies on sugar (Brought by Brazil)* WT/DS266/AB/R, and *European Communities-Export Subsidies on Sugar (brought By Thailand)* WT/DS283/AB/R, all ruled on by the Appellate Body of the WTO on the 28th April 2005.

¹⁰⁸ At point 346(f) of the Appellate Body ruling.

as all other measures implementing or related to the European communities' sugar regime.... into conformity with its obligations" under the WTO Agreement on Agriculture.¹⁰⁹

Pursuant to the CAP reform provisions dealing with the balance of the EC agricultural commodities, Council Regulation (EC) No 1782/2003 provides options for member states, and their regions, for various methods of phasing in the new regime, and phasing out the old regime. In addition, when the new regime has been fully phased in, there will still be coupled payments within the reformed CAP system.¹¹⁰ While the Commission acknowledges that these reforms will "help in negotiating a World Trade Organisation (WTO) agricultural agreement", it would appear that even in its fully reformed format the CAP will still, but to a much lesser extent, be WTO non-compliant and will still have within it "significant levels" of market price support, with "distortions to international trade" having been reduced, but not eliminated.¹¹¹ Even under the reformed common organisations, as discussed in the context of cereals in chapter 2, the "trading market at the external frontiers of the Community" continues to rely on export licences, export refunds, import duties, tariff quotas and emergency safeguard measures.¹¹² The further development of modulation¹¹³ and the further construction of pillar II of the CAP under the proposed new rural development

¹⁰⁹ At point 347 of the Appellate Body ruling.

¹¹⁰ These continuing coupled payments under the reformed CAP system will include payments in the arable sector generally, and for durum wheat in particular, beef exceptions, sheep and goat exceptions, together with drying aid for cereals and direct payments in the outermost regions and the Aegean Islands. Dairy reforms will be delayed, but after its reform there will still be direct dairy payments. Source: Analysis of the 2003 CAP reform (OECD), at page 9.

¹¹¹ Op. Cit. footnote no. 101, at page 43.

¹¹² Council Regulation (EC) No 1784/2003, on the common organisation of the market in cereals, Official Journal, L 270 of 21.10.2003, and supplemented by Commission Regulation (EC) No 2237/2003 of 23 December 2003 laying down detailed rules for the application of certain support schemes provided for in Title IV of Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, OJ L 339 of 24.12.2003.

¹¹³ Pursuant to Article 10 Council Regulation (EC) No. 1782/2003, OJ L 270/1.

regulation,¹¹⁴ in the opinion of the OECD “opens up the possibility of moving towards more targeted policies”¹¹⁵ in the future.

4.3 Development of EC Rural Policy

Despite the lack of reference to an EC Rural Policy in the current version of the Treaty of Rome, such a policy has been developing pursuant to the Rural Policy regulation, Council Regulation (EC) No 1257/1999,¹¹⁶ building on the vision for a Rural policy as set out in the Cork Declaration.¹¹⁷ The main aim of this regulation was to “consolidate nine separate instruments into a single legal framework” to give a greater clarity and “coherence” to pillar II of the CAP.¹¹⁸ While the MacSharry reforms “added a more effective second pillar to the CAP,” CAP remained until the Agenda 2000 reforms essentially a “price support and production control policy”.¹¹⁹ For their part the Agenda 2000 reforms “signalled greater scope for national discretion in rural development regulation”¹²⁰ with the provision for national envelopes, it was only with the recent mid-term review that there has been a “partial re-nationalisation of” rural development policy.

The vision of the Cork Declaration is epitomised in statements to the effect that “Rural Development must address all socio-economic sectors of the countryside” and that “rural development policy must be multi-disciplinary in concept, and multi-sectoral in application”. It is intended that this policy operates over a similar territorial area to most of the EC Regional Policy, with the Rural

¹¹⁴ Updating the provisions currently provided for in Council Regulation (EC) 1257/1999, on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain regulations, OJ L EN, 16080/2661999. This was subsequently elaborated upon by Commission Regulation (EC) No. 1750/1999, of the 23rd July 1999 – OJ L 214, 13, 8, 99 page 31 – 52.

¹¹⁵ Op. Cit. footnote no. 101, at page 44.

¹¹⁶ Op. cit. footnote no. 83.

¹¹⁷ The European Conference on Rural Development, Cork, Ireland, 7th to 9th November, 1996, <http://www.rural-europe.acidl.be>.

¹¹⁸ Greer, A.; Agricultural policy in Europe, Manchester University Press, 2005, at page 36.

¹¹⁹ McMahon, Joseph A.: The Common Agricultural Policy: From Quantity to Quality? NILQ, Vol. 53, No. 1, at page 19.

¹²⁰ Ibid at page 19.

policy operating with a “bottom up” emphasis to an EC adopted policy, as epitomised by the LEADER programmes,¹²¹ in line with the EC principle on subsidiarity.¹²² In the context of the CAP, it is interesting to note that the Leader programme has been conducted pursuant to Article 8 of Regulation (EEC) No 4256/88,¹²³ which deals with DGVI Financing of the CAP. It should however be noted that, in contrast to the breadth of the Cork Declaration, the Rural Policy regulation is somewhat limited in focus, with the emphasis being on agriculture and agri-industries. This does however, bring it directly into the framework of this thesis.

The Rural Policy regulation takes as its legal basis Articles 33(1) and 33(2),¹²⁴ which set out the objectives and other considerations of the CAP, and the currently numbered Article 159 EC,¹²⁵ which deals with Economic and Social Cohesion. The first recital in the regulation reflects the heavy preponderance of agricultural issues addressed in the regulation when it states that, “a common rural development policy should accompany and complement the *other* (emphasis added) instruments of the common agricultural policy”. The Rural policy of the EC has developed further with the mid-term review of the CAP.

It is expected that following the reform of the first pillar of the CAP, discussed above, under the mid-term review, the next major focus of CAP reform will be rural development and the further development of pillar II of CAP.¹²⁶ As matters currently stand, the proposed reform of Pillar II of the CAP will be funded by the European Agricultural Fund for Rural Development (EAFRD), with Pillar I funding to be covered by the European Agricultural Fund for Guarantee

¹²¹ LEADER, LEADER II and LEADER +.

¹²² As set out in recital 14 of the Rural Policy Directive, Council Regulation (EC) No. 1257/99 OJ L EN 16080/2661999 (For a discussion on subsidiarity, see Chapter 6 under the heading, “Relationship with Member State legislation”).

¹²³ OJ L 374, 31/12/88, page 28.

¹²⁴ Article 39 EC pre Amsterdam.

¹²⁵ Article 130b pre Amsterdam.

¹²⁶ European Commission; New Perspective for EU Rural Development, 9/204, 2004, at page 3.

(EAFG),¹²⁷ with Council Regulation (EC) No 1290/2005¹²⁸ having recently been enacted to that end, with provision being made for some phasing in of its provisions, with the totality of the Regulation to be in force by 1st January 2007. In the interim the Rural Development Regulation will continue to fund CAP Pillar II objectives under EAGGF guidance, Objective 1 programmes with Rural Development measures, Objective 2 programmes with Rural Development measures, and Leader+ programmes. Both the aforementioned Objective 1 and 2 policies refer to the current operation of the EC Regional Policy pursuant to Council Regulation (EC) No.1260/99,¹²⁹ for the period 2000 to 2006. Under Article 10(3) of that Regulation three objective areas¹³⁰ and four community initiatives¹³¹ are specified for aid under EC Regional Policy. The Leader+ community initiative, one of the EC Regional Policy tools, focuses on rural development by local action groups, and builds on the Leader and Leader II schemes, which were its precursors.

Mariann Fischer Boel, the current EC Agricultural Commissioner, speaking in February 2005¹³² spoke of a new “European Strategy Document for Rural Development” which she proposes writing, with a view to refocusing the EC Rural strategy. It is her intention to “make explicit the link between rural

¹²⁷ Ibid. at page 13.

¹²⁸ OJ L 209/1.

¹²⁹ Council Regulation (EC) No. 1260/99, laying down general provisions on the structural funds, OJ L 213, 13 August 1999.

¹³⁰ Objective 1 is classified as “development and structural adjustment of regions whose development is lagging behind,” to which 135.9 billion Euros are allocated. Objective 2 is classified as “Economic and Social conversion of areas facing structural difficulties”, to which 22.5 billion Euros has been allocated. Objective 3 is classified as “Adaptation and modernisation of national policies and systems of education and training and employment”, to which 24.05 billion Euros has been allocated.

¹³¹ The four community initiatives are 1. Interreg II, dealing with cross-border, transitional and inter-regional co-operation, 2. Urban, which deals with regeneration of urban areas in crisis, 3. Leader + (of more relevance to this thesis, rural development by local action groups, and 4. Equal, which deals with the trans-national co-operation to fight against discrimination and inequality in access to work.

¹³² Fischer Boel, Mariann: Taking the CAP forward, National Farmers Union – Annual Conference, Birmingham, UK 21 February 2005 (<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/103&format=HTML&age=d=0&language=EN&guiLanguage=en>).

development and the Lisbon strategy¹³³ and lay the basis for a more strategic approach to competitiveness, job creation and innovation in rural areas”.¹³⁴ How exactly this strategy document will develop the second pillar of the CAP has yet to be established. What is clear however, is that the development of the CAP generally, both in its Pillar I and II guises, will reflect the increasing overlap between the CAP and environmental issues, in light of the requirement of farmers in receipt of the SFP to maintain land in Good Agricultural and Environmental Condition (GAEC).¹³⁵ “A “priority list” of 18 statutory European Standards” forms the basis of the test for GAEC,¹³⁶ with Council Regulation (EC) No. 1782/2003 requiring compulsory cross compliance with the requirements of other EC or national schemes that the farmer is operating under.

4.4.1 Introduction to agri-environmental law

The test for GAEC as required by Article 5 of Council Regulation (EC) No 1782/2003 has a strong environmental flavour about it. While the EC has set down some minimum standards that must be complied with in Annex IV to the Regulation, these minimum standards can be supplemented by the individual member states, either at a national or regional level, “taking into account the specific characteristics of the areas concerned, including soil and climatic condition, existing farming systems, land use, crop rotation, farming practices and farm structures”.¹³⁷ The standards set out in Annex IV deal with soil erosion, soil organic matter, soil structure and the minimum level of maintenance of land in order to “avoid the deterioration of habitats”. These provisions are supplemented by the statutory management requirements required by Articles 3 and 4 of Council Regulation (EC) No 1782/2003, which are set out in Annex III to the regulation.

¹³³ SEC (2005) 192 “Lisbon Action Plan incorporating EU Lisbon Programme and recommendations for actions to Member States for inclusion in their national Lisbon programmes” http://europa.eu.int/growth_and_jobs/index_en.htm.

¹³⁴ Op. cit. footnote no. 132.

¹³⁵ Article 5 Council Regulation (EC) No. 1782/2003, OJ L 270/1.

¹³⁶ Op. cit. footnote no. 101, at page 13.

¹³⁷ Article 5.1 of Council Regulation (EC) No. 1782/2003.

These are categorised under the titles of environment, plant and animal health, (to include the identification and registration of animals), public, animal and plant health, (to include the notification of diseases) and animal welfare provisions. These provisions are to operate without prejudice to the provisions in Council Regulation (EC) No. 1257/1999,¹³⁸ “and to agri-environmental measures applied above the reference level of good agricultural practice”.¹³⁹

The development of these provisions, together with the “more targeted policies” of Pillar I of the CAP, forecasted by the OECD,¹⁴⁰ together with the impending review of the EC Rural policy under the proposed reform of Pillar II CAP, brings this discourse of CAP reform into the framework of the Sixth Environmental Action Programme,¹⁴¹ and its key concept of the integrated product policy.¹⁴²

The Sixth Community Environment Action Programme¹⁴³ makes specific reference to both international trade and the CAP. This is interesting as in the context of the trade and environment debate within the EC “there has been a marked reluctance” to deem environmental trade issues to come within the CCP,¹⁴⁴ with “all international environmental agreements” adopted by the EC having “been adopted on a basis other than Article 113”.¹⁴⁵ Case law from the ECJ does not appear to have assisted the matter, with, as stated by Hession and MacRory, the “distinctions in philosophy”¹⁴⁶ behind EC Commercial law and EC Environmental law continuing to pose problems for the development of this area

¹³⁸ The Rural Development Regulation.

¹³⁹ Article 5.1. Council Regulation (EC) No 1782/2003.

¹⁴⁰ Op. cit. footnote no. 101, at page 44.

¹⁴¹ Pursuant to Decision No.1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, OJ L. 242, 10/9/2002, at page 1.

¹⁴² First seen in the European Commission’s Green Paper on Integrated Product Policy, COM (2001) 68 of 7 February 2001.

¹⁴³ Op. cit. footnote no. 141.

¹⁴⁴ Hession, Martin and MacRory, Richard; *Balancing Trade Freedom with the Requirements of Sustainable Development*, Ch 13 in Emiliou and O’Keeffe, *The European Union and World Trade Law after the GATT Uruguay Round*, John Wiley and Sons, 1996, at page 211.

¹⁴⁵ Ibid. at page 211.

¹⁴⁶ Ibid. at page 216.

of law, despite the goal of sustainable development in the post- Maastricht version of the EC treaty. Provisions covered by EC Environmental policy, of interest in the context of CAP reform, include the pre-existing Habitats directive,¹⁴⁷ the Wild Birds directive¹⁴⁸ and the Water Framework directive,¹⁴⁹ which concerns itself, *inter alia*, with the pollution of ground waters with pesticides and nitrates. In addition the EC's state aid guidelines, referred to above and the rural development policy¹⁵⁰ also require an indication of the environmental impact of actions under their provisions.

4.4.2 The EC's Sixth Environmental Action Programme

The key priorities of the Sixth Environmental Action Programme are climate change, nature and biodiversity, environment and health and quality of life, and natural resources and waste.¹⁵¹ In addition to the expected provisions on natural habitats and wild life, it is interesting to note that reference is made both to the need to strengthen a "world trade system that fully recognises Multilateral or Regional Environmental Agreements and the precautionary principle," referred to in Article 9.2, with reference to the world trade system noticeably being made in small capitals, leaving open the possibility that either reform of the WTO, or of some other organisation either to replace or complement the WTO might be a future line of development for the EC in this policy area. Also of relevance to this thesis is the reference in the same article to the need to align sustainable environmental practices with the EC's policy on foreign investment and export

¹⁴⁷ Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora, OJ L206, p.7.

¹⁴⁸ Council Directive 79/409/EEC on the Conservation of Wild Birds OJ L103 1979.

¹⁴⁹ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L327, 22/12/2000, p.1-73.

¹⁵⁰ Through Council Regulation (EC) No 1257/1999 on support for rural development from the European Agricultural guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulation; Commission Regulation (EC) No 1750/1999 of 23 July 1999 laying down detailed rules for the application of Council Regulation (EC) No 1257/1999 on support for rural development from the EAGGF; Commission Regulation (EC) No 2603/1999 of 9 December 1999 laying down rules for the transition to the rural development support provided for by Council Regulation (EC) No 1257/1999, OJ L 316, 10/12/1999, p. 26.

¹⁵¹ Op. cit. footnote no. 141, at Article 1.4.

credits. No distinction is made in this document between agricultural and non-agricultural trade, with the preamble to the decision referring generally to the need “to achieve decoupling between environmental pressures and economic growth”,¹⁵² recognising that “there is considerable pressure from human activity on nature and biodiversity”,¹⁵³ and that this action needs to be taken at a global level, as “economic globalisation means that environmental action is increasingly needed at international level”,¹⁵⁴ while making a very specific reference to a matter at the heart of agriculture, (soil) at recital no. 22 of the Preamble, “Soil is a finite resource that is under environmental pressure”. The impact that this particular development will have on the EC’s relationship with the WTO, in the context of both agricultural and non-agricultural trade, merits further examination.

The integrated product policy, currently drafted in the context of industrial goods, requires “environmental requirements” to be taken into consideration “throughout the life-cycle of products”, with the requirements to establish “a compliance assistance programme, with specific help from small and medium enterprises”.¹⁵⁵ The integrated product policy,¹⁵⁶ is seen as one of the strategic approaches to meeting the environmental objectives of the action plan,¹⁵⁷ has attracted comment from Quick and Lau, in the context of environmentally motivated tax distinctions and WTO law.¹⁵⁸ They point out that “it is now recognized that (GATT 1994) does not automatically place a higher value on trade over the environment”. They come to this conclusion on the basis of the Article XX panel and Appellate Body reports, which they conclude support the proposition that “environmental protection and regulatory autonomy to protect the

¹⁵² At recital 8 of the Preamble.

¹⁵³ At recital 21 of the Preamble.

¹⁵⁴ At recital 30 of the Preamble.

¹⁵⁵ At Article 5.3, first indent, of the European Commission’s Green Paper on Integrated Product Policy, COM (2001) 68 of 7 February 2001.

¹⁵⁶ First seen in the European Commission’s Green Paper on Integrated Product Policy, COM (2001) 68 of 7 February 2001.

¹⁵⁷ At Article 5.3, first indent.

¹⁵⁸ Quick, Reinhard and Lau, Christian; Environmentally motivated tax distinctions and WTO law; The European Commission’s Green Paper on Integrated Product Policy in light of the “like product – “ and “ppm-“ Debates. JIEL 2003, 6(2) 419-458, from page 419, et seq.

environment are accepted.”¹⁵⁹ It is submitted that it is undoubtedly true that Article XX does provide general exceptions in its various subsections, but how these subsections are to operate in practice remains unclear. Quick and Lau conclude that the legal status of the EC’s IPP approach *vis à vis* WTO obligations is therefore “no longer as clear cut as it was ten years ago when the *Tuna/Dolphin* disputes were decided under the old GATT.”¹⁶⁰ It should perhaps be pointed out that the *Tuna/Dolphin* ruling might not have been all that clear on this point as the panel in that case¹⁶¹ were not satisfied that the US had provided “sufficient evidence” that the relevant import prohibition had “complied with the requirements of Article XX and notably sub-paragraph (g) of that article”. While Quick and Lau’s analysis of the potential problematic interaction between the EC and the WTO with regard to the proposed EC’s IPP is acknowledged, the clarity which they attempt to bring to bear on the operation of Article XX of GATT can yet be challenged. In addition, in the context of the subject matter of this thesis, the status of the IPP in the context of agricultural goods would have to be examined in the context of the WTO Agreement on Agriculture, and its provisions under Article 20. Article 20, *inter alia*, requires the continuation of the reform process in agriculture to take “into account.... non-trade concerns, ... and the other objectives and concerns mentioned in the preamble to this Agreement,” which in their turn provide for, at the fourth recital, “non-trade concerns, including food security and the need to protect the environment”.

The reference of the 6th Environmental Action Programme to the promotion of “effective and sustainable use and management of land....taking account of environmental concern”¹⁶² is squarely within this reformed CAP framework. If the concept of the integrated product policy be adopted in the context of agricultural products is adopted this would add an important further dimension to the recent agricultural reform. The possibility of such a development

¹⁵⁹ Ibid. at page 448.

¹⁶⁰ Ibid. at page 448.

¹⁶¹ At point 4.15 of their ruling.

¹⁶² At Article 3.10, third indent of the European Commission’s Green Paper on Integrated Product Policy, COM (2001) 68 of 7 February 2001.

is clearly indicated in the CAP documentation, and the development of the farm advisory service, required under Article 13 of Council Regulation (EC) No. 1782/2003,¹⁶³ could become a key factor of the development of the integrated product policy, which is currently written in the context of industrial products, as a key factor in the production of agricultural commodities.

4.5 Continuing the Multifunctionality debate of CAP

At this point it is worth referring back to the discussion on the multifunctionality of agriculture in chapter 2. There, the development of this policy was to encompass the issues of “safe and high quality goods”, the protection of the environment, the saving of “finite resources”, the preservation of rural landscapes, and the contribution that agriculture makes to the “socio-economic development of rural areas including the generation of employment opportunities”.¹⁶⁴ This approach was developed with a view to defending the EC CAP during the course of the current Millennium round of negotiations at the WTO, with the European Commission seeing it as a “key issue to be addressed in the WTO context”.¹⁶⁵ The diverse and often conflicting objectives of the CAP are written into Article 33 EC, and despite the many radical changes to the EC under the new European Constitution, there is no redrafting of these provisions, or rebalancing of these provisions in Article III-315 EU, despite the changed economic and political climate in which the CAP, originally drafted in the wake of World War II and during a period of rationing, is now operating.

Each of these themes is reflected in the recent reforms of Pillar 1 of the CAP, with the increasing overlap between the CAP and environmental issues, in particular, as discussed above, the requirement to keep land in “good agricultural

¹⁶³ Op. cit. footnote no.43.

¹⁶⁴ Info-Paper, Agriculture: Process of analysis and Information Exchange of the WTO; Contribution of the European Community on the Multifunctional Character of Agriculture, October 1999, at page 1.

¹⁶⁵ Ibid. at page 1.

and environmental condition”¹⁶⁶ to include the requirement to maintain land in a manner in order to “avoid the deterioration of habitats” is clearly in line with the multifunctionality philosophy that currently underpins the CAP. This reflects the concern of the Commission that unused land would “not automatically revert to its original wild state”.¹⁶⁷ It is to be expected that the proposed reform of Pillar II of CAP, with its underpinning funding from the European Agricultural Fund for Rural Development (EAFRD)¹⁶⁸ will continue this trend. The adoption of the integrated product policy into the field of agriculture would also develop on this theme. It could be questioned however, how well the current reform, certainly in EC legislation, reflects the view of the Commission that agriculture provides “services” which are “mainly of a public good character”,¹⁶⁹ and to what extent this matter is being left to the member states, or the regional authorities of member states, to write into their “land use” provisions permitted under Article 5 Council Regulation (EC) No 1782/2003 and its Annex IV framework. The vision of the Committee of the Regions of the provision of a “higher level of environmental service” than the minimum, possibly being “remunerated by appropriate agri-environmental measures”¹⁷⁰ referred to in chapter 2, has yet to be written into the CAP reform provisions, but perhaps this will appear in the anticipated reform of Pillar II CAP.

5. Health and Consumer issues

5.1 Health Issues

Health and consumer issues add to the complexity of the backdrop of trade in agricultural commodities at the WTO and EC level. Health in this context covers

¹⁶⁶ Article 5 Council Regulation (EC) No. 1782/2003, OJ L 270/1.

¹⁶⁷ Op. cit. footnote no. 164, at page 2.

¹⁶⁸ European Commission; New Perspective for EU Rural Development, 9/204, Europa website.

¹⁶⁹ Op. Cit. footnote no. 164, at page 1.

¹⁷⁰ Opinion of the Committee of the Regions on the "Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on Directions towards sustainable agriculture" OJ C 156, 6/6/2000, at page 46.

plant, animal and human health, bringing into the fray different international organisations. On the issue of human health, both the Codex Alimentarius Commission,¹⁷¹ and the World Health Organisation (WHO)¹⁷² of the UN come into play. Animal and plant health issues involve, at an international level, the International Plant Protection Convention (IPPC),¹⁷³ and the International Office of Epizootics (OIE).¹⁷⁴ At a WTO level, issues pertaining to health of animals, plants and humans, are addressed by the WTO Agreement on Sanitary and Phytosanitary measures (SPS). Issues pertaining to consumer law, such as the labelling of GM foods, would be dealt with, to the extent that they are not SPS issues, by the WTO Agreement on the Technical Barriers to Trade (TBT). It should be noted that the SPS provisions are “generally more rigorous” than the TBT agreement, thereby having an important impact on the operation of the provisions of these two agreements.¹⁷⁵

The EC, for its part, has well developed policies on human health¹⁷⁶ and consumer¹⁷⁷ issues, each underpinned by their own article in the EC treaty, reflecting an artificial dichotomy between these two policy areas, particularly in the context of agricultural commodities. Community action on health is lead by the Council, to “complement national policies”, while fully respecting “the responsibilities of the Member States for the organisation and delivery of health services and medical care”,¹⁷⁸ while EC Consumer policy is seen as being part of the process to complete the internal market.¹⁷⁹ In addition the European Food

¹⁷¹ http://www.codexalimentarius.net/web/index_en.jsp (founded in 1963 by the Food and Agriculture Organisation and the World Health Organisation, both UN bodies).

¹⁷² <http://www.who.int/en/>.

¹⁷³ <https://www.ippc.int/IPP/En/default.jsp>, which is governed by the Interim Commission on Phytosanitary Measures.

¹⁷⁴ Also known as the World Organisation for Animal Health, http://www.oie.int/eng/en_index.htm.

¹⁷⁵ Covelli, Nick and Hohots, Viktor, The Health Regulation of Biotech Foods under the WTO Agreements, *Journal of International Economic Law* 6(4), 773-795, at page 776.

¹⁷⁶ Article 152 EC. EC provisions on animal health would be subject to greater integrative development pursuant to the CAP.

¹⁷⁷ Article 153 EC.

¹⁷⁸ At Article 153.5 EC.

¹⁷⁹ Article 153.3(a) EC.

Safety Authority (EFSA)¹⁸⁰ has been set up¹⁸¹ to “reinforce the present system of scientific and technical support which is no longer able to respond to increasing demands on it”.¹⁸² It is interesting to note that Regulation 178/2002 further provides that the EFSA is to “take on the role of an independent scientific point of reference in risk assessment and in so doing should assist in ensuring the smooth functioning of the internal market”, “thereby enabling the Community institutions and Member States to take informed risk management decisions”.¹⁸³ The focus on risk assessment and risk management within the EC is interesting, given that they have become key words in the application of the WTO SPS agreement,¹⁸⁴ becoming the turning point of many disputes before the WTO panels and Appellate Body.¹⁸⁵ There is also a requirement, at recital 35 of Regulation 178/2002, for the strengthening of the link between risk assessors and risk managers.

At an international level, not only is the EC subject to the provisions of the WTO SPS agreement, but it has also acceded, in its own right, to a new revised version of the IPPC,¹⁸⁶ becoming a member of the IPPC along side each of its now 25 member states. It also applied to become a member of the Codex Alimentarius Commission in 2003,¹⁸⁷ after a change in the internal rules of the commission permitting RIA's to become members.

¹⁸⁰ http://www.efsa.eu.int/index_en.html.

¹⁸¹ Pursuant to Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, Official Journal L 31, 01.02.2002. This was amended by Regulation (EC) No 1642/2003 of the European Parliament and of the Council of 22 July 2003, Official Journal L 245, 29.09.2003.

¹⁸² Recital no. 33 of Regulation (EC) No 178/2002.

¹⁸³ At recital no. 34.

¹⁸⁴ Article 5 SPS.

¹⁸⁵ Inter alia, *EC – Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate body, WTO docs. WT/DS26/AB/R, WT/DS26/AB/R, adopted Feb. 13, 1998, *Australia – Measures Affecting Importation of Salmon*, Report of the Appellate body, WTO doc, WT/DS18/AB/R, adopted Nov. 6, 1998, and *Japan - Restrictions on Imports of Certain Agricultural Products* Panel report adopted on March 22, 1988, BISD 35S/163.

¹⁸⁶ Press release IP/04/969, “Plant health and world trade: EU signs up to new international rules”, Brussels, 20 July 2004, (http://ec.europa.eu/dgs/health_consumer/library/press/press342_en.pdf).

¹⁸⁷ 2003/822/EC: Council Decision of 17 November 2003 on the accession of the European Community to the Codex Alimentarius Commission, O.J.L 309, 26/11/2003 P. 0014 – 0021.

The WTO agreements on SPS and TBT have a shared ancestry within GATT, both deriving from the Tokyo Round Standards Code, with the TBT now dealing with “all technical standards and measures not covered by the SPS Agreement”.¹⁸⁸ In addition the TBT covers “standards” and “technical regulations”¹⁸⁹ adopted prior to the coming into force of the WTO, but which have not ceased to have effect yet.¹⁹⁰ Covelli and Hohots have pointed out, that in addition to these agreements, it is possible that the provisions of Article XX(b) GATT 1994, which provide a general exemption for the protection of health or life, might still apply¹⁹¹ separately from the provisions of the TBT and SPS agreements in very limited circumstances,¹⁹² and that the SPS might apply, “even if there is no claim or finding of inconsistency under the GATT”.¹⁹³ This framework, together with the aforementioned international agreements, now comprise, in their view, “a bewildering labyrinth of rules for (...) food regulators to navigate”,¹⁹⁴ added to the fact that the SPS Agreement itself, has been held by the Appellate Body in *EC – Hormones*¹⁹⁵ as being “evidently not a model of clarity in drafting and communication”.¹⁹⁶

This labyrinth starts with the interaction, or otherwise, of the WTO SPS agreement with the international organisations operating in this area. The SPS agreement encourages, “without obliging Members to adopt the standards,

¹⁸⁸ Trebilock, Michael and Soloway, Julie; International trade policy and domestic food safety regulation: The case for substantial deference by the WTO Dispute Settlement Body under the SPS Agreement, Chapter 18 in Kennedy and Southwick; *The Political Economy of International Trade Law*, Cambridge University Press, 2002, at page 341.

¹⁸⁹ It should be noted that “technical regulations” are deemed to be binding, while “standards” are not considered to be such a rigorous obligation within WTO law.

¹⁹⁰ Op. cit. footnote no. 175, at page 785.

¹⁹¹ As was held in the *EC – Asbestos* panel ruling, an error of law in the opinion of Covelli and Hohots, see page 791, at footnote no. 85.

¹⁹² Op. cit. footnote no. 175, at page 776.

¹⁹³ Ibid. at page 791.

¹⁹⁴ Ibid. at page 776.

¹⁹⁵ Op. cit. footnote no. 1083, at para. 133.

¹⁹⁶ Scott J.; On Kith and Kine (and Crustaceans): Trade and Environment in the EU and WTO, in Weiler J.H.H.; *The EU, the WTO and the NAFTA; Towards a Common law of International Trade*, Oxford University Press 2000, at page 149, quoting paragraph 175 of the Appellate Body ruling.

guidelines or recommendations” of the three international organisations, the Codex Alimentarius, the OIE and the IPPC.¹⁹⁷ The SPS agreement provides at Article 3.2 that sps measures meeting international standards will be “presumed to be consistent with the relevant provisions of this Agreement”. Standards higher than international standards are permissible “if there is a scientific justification” pursuant to Article 3.3 SPS. The Codex Alimentarius was accepted as being such an “international body” by the panel in *EC – Sardines*¹⁹⁸ as it was “open to all members”.¹⁹⁹ The WHO, however, was not accorded such a standing, in the *Thai Cigarettes* case,²⁰⁰ when restrictions “necessary for public health reasons”,²⁰¹ were in dispute, with the panel ignoring evidence for the WHO that the opening up of markets to US cigarettes led to an increase in smoking.²⁰²

The distinction between risk assessment and risk management at the WTO was rejected by the panel in *Beef Hormones*, “as having no textual basis” despite the fact that a distinction between the two had been “widely recognised in the risk regulation literature”.²⁰³ As stated by Trebilock and Soloway, there is a need for panels to benefit from both scientific expertise, addressing the issue of risk assessment, and “regulatory/consumer protection expertise” addressing the issue of risk management, in order to ensure that the “regulatory response to identified risks meet the least trade-restrictive means and consistency requirements under Articles 5.6 and 5.5 respectively”.²⁰⁴ The Appellate Body in *EC-Hormones* did clarify that a valid SPS measure “need not be supported by the majority of the

¹⁹⁷ Prévost, Denise; Selected international developments regarding health and environmental regulation of relevance to the European Union, ELER 2004 13(2) 38-60, at page 56.

¹⁹⁸ *European Communities – Trade Description of Sardines (EC – Sardines)*, WT/DS23/AB/R, September 2002 and WTO Panel Report, *European Communities – Trade Description of Sardines (EC – Sardines)*, WT/DS231/R, 29 May 2002.

¹⁹⁹ Op. cit. footnote no. 176, at page 789.

²⁰⁰ *Thai Cigarette (Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes)*, Report of the Panel, (1990) 37 BISD 200.

²⁰¹ Howse, Robert; Adjudicative Legitimacy and Treaty Interpretation in International Trade Law, in Weiler, J.H.H.(ed.): *The Early Years of WTO Jurisprudence*, The EC, the WTO and the NAFTA, Towards a Common Law of International Trade, Oxford University Press, 2000, at page 63.

²⁰² Ibid. at page 63.

²⁰³ Op. cit. footnote no. 188, at page 561.

²⁰⁴ Ibid. at page 572.

relevant scientific community” and “divergent or minority opinion”... “will not necessarily operate to negate the reasonableness of the relationship between the measure and risk management”.²⁰⁵

The precautionary principle has also suffered at the hands at the WTO, with the issue of whether it applied “if at all”²⁰⁶ being the key issue in *EC - Hormones*, and *Japan - Varietals*.²⁰⁷ In *Japan - Apples*²⁰⁸ both the panel and Appellate Body found that, while the precautionary principle was embodied in Article 5.7 SPS, it did “not create a broad loophole in the scientific disciplines of the SPS Agreement”, but rather created a “limited exception” where “there is a true lack of relevant and reliable scientific evidence” for addressing the issue of risk.²⁰⁹ The Appellate Body in *EC-Hormones*²¹⁰ ruled that the precautionary principle could only be applied “to the extent that it finds reflection in the provisions of the Agreement itself”.²¹¹ The SPS Agreement, at Article 5, for its part, provides detailed issues which have to be taken into account in conducting a risk assessment for the purposes of that Agreement. A continuing obligation remains on countries constantly to review the scientific evidence upon which their original “precautionary principle” risk assessment was based, with the current EC position on the precautionary principle being set out in the ECJ case of *Pfizer Animal Health SA*,²¹² as discussed in chapter 3, with the test to be a scientific test, and the role of the judiciary limited to a judicial review function.

The ECJ for its part, has made it clear that the “precautionary principle” is an established principle in EC law, through its “routine approval of ‘precautionary

²⁰⁵ Op. cit. footnote no. 196, at page 154.

²⁰⁶ Op. cit. footnote no. 175, at page 784.

²⁰⁷ WTO Panel Report – *Japan – Measures Affecting Agricultural Products (Japan – Varietals)*, WT/DS76/R, 20 October 1998.

²⁰⁸ *Japan- Measures affecting the Importation of Apples (Japan – Apples)*, WT/DS245/R, adopted 10 December 2003 after being upheld by the Appellate Body.

²⁰⁹ Op. cit. footnote no. 197, at page 42.

²¹⁰ Op. cit. footnote no. 195.

²¹¹ Op. cit. footnote no. 197, at page 41, footnote no. 38.

²¹² Case T-13/99, *Pfizer Animal Health SA v. Council of the European Union*, Judgment of the Court of First Instance, (third chamber), [2002] ECR page II-03305.

regulations”.²¹³ However, the EC’s definition of this principle “remains highly-generalised and uncertain”,²¹⁴ adding to the “inconsistent global understandings” of this term.²¹⁵ AG Mischo has recently stated,²¹⁶ that judicial review of the use of the precautionary principle “must be exercised with caution”, as courts cannot “impose their own conviction” on what is a scientific problem.²¹⁷ The EC Commission has,²¹⁸ for its part, distinguished between a strong, and a not-so-strong application of the principle, in relation to BSE²¹⁹ matters. The ECJ has yet to give a clear definition of the principle for operation within the EC jurisdiction.

The lack of clarity of the EC’s use of the term “precautionary principle” is reflected in its litigation at the WTO level on this issue. In the *Beef Hormones*²²⁰ case, at the panel stage, who stated that the EC had adopted the “international law understanding of the precautionary principle” which “overrode the SPS Agreement”.²²¹ By the time the case appeared before the Appellate Body the EC had a more judicious approach of “providing a detailed explanation of Europe’s precautionary principle.”²²² Both the panel and the Appellate Body found that the EC’s principle was too vague to “override the explicit wording” of the SPS Agreement, and that the precautionary principle “was not yet accepted in international law”, so that line of argument would not be efficacious either.²²³ The SPS standard was therefore held to be binding on the EC.

²¹³ Daemen, Thomas J., The European Community’s Evolving Precautionary Principle – Comparisons with the United States and Ramifications for Doha Round Trade Negotiations, *European Environmental Law Review*, January 2003, page 6, at page 12.

²¹⁴ Ibid. at page 9.

²¹⁵ Ibid. at page 9.

²¹⁶ Case C-241/01 *National Farmers’ Union v. Secrétariat général du gouvernement*, Opinion of Advocate General Mischo, [2002] ECR, I-9079, at paragraph 73 and 74 of the Opinion.

²¹⁷ Op. cit. footnote no. 214, at page 11.

²¹⁸ European Commission *Communication From The Commission on the Precautionary Principle* (2000),

(http://66.102.9.104/search?q=cache:FPvLJm_toUgJ:ec.europa.eu/dgs/health_consumer/library/pub/pub07_en.pdf+Communication+from+the+Commission+on+the+Precautionary+Principle&hl=en&gl=uk&ct=clnk&cd=1).

²¹⁹ Bovine Spongiform Encephalopathy.

²²⁰ Op. cit. footnote no. 195.

²²¹ Op. cit. footnote no. 213, at page 14.

²²² Ibid. at page 14.

²²³ Ibid. at page 14.

With the US Supreme Court rejecting the “total adoption” of the precautionary principle in *Industrial Union Dept. v. American Petroleum Inst.*,²²⁴ adopting rather an “evidence first approach” of “quantitative risk assessment”,²²⁵ prior to applying any precautionary factor, the differing “social/cultural tolerances for certain risks”²²⁶ will continue to bedevil the search for a globally acceptable definition of the term, with much of Doha Ministerial Conference in 2001 addressing “environmental issues including the precautionary principle”.²²⁷

5.2 Consumer issues

The WTO Technical Barriers to Trade (TBT) Agreement, for its part, regulates consumer issues (which are not otherwise SPS issues)²²⁸ at the WTO level. From an agricultural perspective, the labelling of GM foods would fall under this agreement, while any safety issues relating to GM foods would fall within the remit of the SPS Agreement.²²⁹ Unlike the SPS, the TBT has to date generated little WTO case law,²³⁰ appearing “to be generally less stringent on regulators than the SPS Agreement”.²³¹ In *EC - Asbestos*²³² the Appellate Body ruled that the ban on asbestos was a technical regulation, to which the TBT applied. Article 2.4 TBT provides that “where international standards exist or are imminent” then members “must generally use them as ‘the basis for’ their technical regulations”, a different approach to that taken by the SPS agreement.²³³

²²⁴ *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 60 (1980).

²²⁵ Op. cit. footnote no. 213, at page 16.

²²⁶ Ibid. at page 17.

²²⁷ Ibid. at page 18.

²²⁸ Article 1.5 TBT.

²²⁹ Op. cit. footnote no. 175, at page 779.

²³⁰ The TBT was relevant in *European Communities – Trade Description of Sardines (EC – Sardines)*, WT/DS23/AB/R, September 2002 and WTO Panel Report, *European Communities – Trade Description of Sardines (EC – Sardines)*, WT/DS231/R, 29 May 2002, and in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC – Asbestos)*, WT/DS135/AB/R, 12 March 2001.

²³¹ Op. cit. footnote no. 175, at page 785.

²³² *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC – Asbestos)*, WT/DS135/AB/R, 12 March 2001.

²³³ Op. cit. footnote no. 175, at page 787.

Weakness in the drafting of the TBT articulating international standards into the WTO framework has resulted in the Appellate Body showing great reluctance to accord authority to such standards.²³⁴ Article 2.4 TBT refers to “relevant international standards” without specifying whose standards these are to be. As pointed out by Scott, relevant standards, in the view of the Appellate Body in the *EC – Sardines*²³⁵ case “need not be approved by consensus”.²³⁶ It is Covelli and Hohots’ view that in the absence of the existence of international standards or appropriate science, that WTO members, under the broad “approach to risk assessment” under the TBT Agreement, can still impose technical regulations or standards.²³⁷ Concern has been expressed about the “legitimacy of the standard-setting bodies in question”,²³⁸ and their susceptibility “to capture” by vested interests.²³⁹ This is particularly so with regard to the TBT Agreement, as unlike the organisations explicitly mentioned in the SPS Agreement, the relevant bodies of the TBT Agreement may comprise either state or private members.²⁴⁰

In contrast, the EU is prepared to grant, “considerable – though contingent – authority” to international standards “as levers of market access”.²⁴¹ The Community grants this authority subject to the existence in the international standards of a “substantive benchmark” with “fundamental procedural prescriptions”, together with the requirements to give “reasons, and transparency requirements”.²⁴² These, or similar tests, are lacking at the WTO level. The fallback position of members imposing their own standards remains, as long as

²³⁴ Scott, Joanne; *International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO* EJIL 2004, Vo. 15 No. 2, 307-354, at page 310.

²³⁵ *European Communities – Trade Description of Sardines (EC – Sardines)*, WT/DS23/AB/R, September 2002 and WTO Panel Report, *European Communities – Trade Description of Sardines (EC – Sardines)*, WT/DS231/R, 29 May 2002.

²³⁶ Op. cit. footnote no. 234, at page 324.

²³⁷ Op. cit. footnote no. 175, at page 787.

²³⁸ Op. cit. footnote no. 234, at page 324.

²³⁹ Ibid. at page 324.

²⁴⁰ Ibid. at page 330, at footnote no. 89.

²⁴¹ Ibid. at page 330.

²⁴² Ibid. at page 330.

they do not operate in a discriminatory way, or are in fact restrictions on trade.²⁴³ This causes concern as, for example, in the case of the labelling of GM foods, different approaches can exist in different jurisdictions. The TBT Agreement, at Article 2.8 adds another complexity to the issue of GM food labelling. This provides that “wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than on design or descriptive characteristics”. The US and Canada “regulate the end GM food products”, with very few GM food products being different from their non-GM counterparts, with the EU, in contrast, regulating the “process used to create GM products”.²⁴⁴ There is a possibility that the EU’s regulation of GM products could be found to be in breach of the WTO TBT agreement. As it is the US has requested formal consultations²⁴⁵ on the EC’s “the de facto moratorium on approval of GMOs”.²⁴⁶

Anderson has pointed out that there is an inherent weakness in the SPS agreement to the extent that it does not address consumer interests, stating that “consumers have lacked a voice” arguing that consumer issues should be addressed “via labelling”.²⁴⁷ This is perhaps confusing the nature of the SPS and the TBT agreements. Blanford and Fulponi raise the issue of differing “values and beliefs among countries”²⁴⁸ which should be classified as a consumer matter. They further extend the consumer debate to issues such as animal welfare, arguing that where “consumers are not able to distinguish” between animal welfare friendly goods and others this brings a “dysfunction in the market”,²⁴⁹ as a result of an asymmetry of “information between the buyer and seller” leading to

²⁴³ Op. cit. footnote no. 175, at page 786.

²⁴⁴ Ibid. at page 787 et seq.

²⁴⁵ WT/DS291/1.

²⁴⁶ Op. cit. footnote no. 197, at page 44.

²⁴⁷ Anderson, Kym; Agriculture, developing countries and the Doha Development Agenda; Chapter 6 in Ingco, Merlinda D. and Winders, L. Alan; Agriculture and the New Trade Agenda Creating a Global Trading Environment for Development, Cambridge University Press, Cambridge, 2004.

²⁴⁸ Blanford, David and Fulponi, Linda; Emerging public concerns in agriculture: domestic policies and international trade commitments; European Review of Agricultural Economics Vo. 26(3) (1999) pp. 409-424, at page 410.

²⁴⁹ Ibid at page 414.

“a specific type of market failure”.²⁵⁰ Animal welfare issues are not currently governed by the WTO regime, leading to the potential for future trade conflicts. While trade in such “ethical food” is limited at the moment, it is likely to grow in the future as more countries introduce “binding regulations for animal welfare”.²⁵¹ Some discussion has been held on the inclusion of factors other than “uniquely science based and human health oriented” provisions within the Codex Alimentarius,²⁵² which might well be one way of addressing the issue of trade in food produced complying with an internationally approved code on animal welfare standards,²⁵³ thereby avoiding the possibility of countries adopting what might otherwise be regarded as new non-tariff barriers.²⁵⁴ Blanford and Fulponi go on to suggest that an “independent private organisation”, such as “the ISO in the agro-food sector” might have a role to play in this area.²⁵⁵

6. The Cartagena Protocol on Bio-Safety

6.1 The Cartagena Protocol on Bio-Safety within the EC legal framework

The Cartagena Protocol on Bio-Safety has added another complication to the EC WTO discourse on trade in agricultural commodities. On the issue of GM foods, the Cartagena Protocol on Bio-Safety²⁵⁶ is regarded by the EU “as the most significant international cooperative effort to address the challenges posed by GMOs.”²⁵⁷ The Council, by way of Council Decision 2002/628/EC of the 25th

²⁵⁰ Ibid at page 414.

²⁵¹ Ibid. at page 420.

²⁵² Ibid. at page 420.

²⁵³ Ibid at page 420.

²⁵⁴ Ibid. at page 420.

²⁵⁵ Ibid. at page 422.

²⁵⁶ Which entered into force on the 11th September 2003, 90 days after its ratification by its 50th signatory member state. It is attached to the Convention on Biological Diversity, (31 ILM 818), which was concluded in 1992, under the auspices of the UN Conference on Environment and Development. It is signed by 168 countries, but noticeably, not by the United States. Op. cit. footnote no. 199, at page 54.

²⁵⁷ Ibid. at page 55.

June 2002²⁵⁸ approved the signing of the Cartagena Protocol on Biosafety, which was adopted in Montreal on the 29th January 2002, having been attached to the Convention on Biological Diversity, agreed under the United Nations Environment Programme. The European Community then put in place its own operational provisions under this protocol by way of Regulation (EC) No 1946/2002.²⁵⁹ This protocol permits the taking of measures which affect the importation of GMO's "in the absence of scientific certainty on these potential risks".²⁶⁰ It therefore bases its operation on the precautionary principle, as stated in paragraph 2 to the preamble of Regulation (EC) No.1946/2002, which itself adopts the precautionary principle for the working of this regulation within the EC, as stated in the 22nd recital to the preamble. As also discussed in chapter 3, while the ECJ has recognised that the "precautionary principle" is an established principle in EC law, through its "routine approval of 'precautionary regulations'",²⁶¹ the "highly-generalised and uncertain"²⁶² use of the term within the EC continues to be a problem generally, and it can be anticipated, will be a problem specifically in the context of genetically modified organisms.

6.2 The WTO, the Environment and the Cartagena Protocol on Bio-Safety

The Cartagena Protocol on Bio-safety,²⁶³ has been referred to as a "de facto trade agreement" on GM products, which "enshrines" the precautionary principle,²⁶⁴ which principle has a less prominent status within the SPS and TBT Agreements. The Protocol permits the taking of measures which affect the importation of GMO's, "in the absence of scientific certainty on these potential

²⁵⁸ 2002/628/EC Council Decision of 25 June 2002, OJ 2002 L201/48.

²⁵⁹ Regulation (EC) No. 1946/2003 of the European Parliament and of the Council of 15 July 2003 on transboundary movements of genetically modified organisms, OJ L 287/, 05/11/2003, p. 1.

²⁶⁰ Op. cit. footnote no. 197, at page 55.

²⁶¹ Op. cit. footnote no. 213, at page 12.

²⁶² Ibid. at page 9.

²⁶³ Attached to the Convention on Biological Diversity, agreed under the United National Environment Programme.

²⁶⁴ Op. cit. footnote no. 175, at page 793.

risks”.²⁶⁵ While the Protocol itself confirms that “obligations under other international agreements are not abrogated by it”,²⁶⁶ with its reliance on the precautionary principle, and the TBT²⁶⁷ and SPS Agreements,²⁶⁸ will resolve itself,²⁶⁹ given the panel view in *Beef Hormones*²⁷⁰ that the precautionary principle “was not yet accepted in international law”,²⁷¹ with the SPS standards being held to be binding on the EC. These issues will be problematic given public sensitivity to issues of food quality and animal and plant health, particularly in the EC, after numerous recent scares and incidents. Relationships between the WTO and the United Nations Environmental Programme (UNEP) will therefore be crucial.

The resolution of the issue of scientific uncertainty, and the interpretation or even the use of the term “precautionary principle” at the WTO, which remains outstanding, will hopefully be addressed by way of ministerial declaration after the 6th ministerial conference. Clarity needs to be brought to this issue at the WTO, particularly from the perspective of the EC, however, it should be noted that a ministerial declaration is just that, a declaration, and not a provision of a legally binding agreement, until such time as it is adopted by a subsequent legal agreement.²⁷² It may however, given the fact that the WTO is rule oriented rather than rule based, assist in giving a political background for a decision by either the panel or Appellate Body in a particular case. The developing synergy within the EC of agricultural, environmental and rural law, in the guise of the mid-term review of the CAP, with the continuing tense relationship between agricultural and environmental issues at the WTO level requires some resolution. In addition the tensions between the two levels of governance in the area of health and

²⁶⁵ Op. cit. footnote no. 197, at page 55.

²⁶⁶ Op. cit. footnote no. 175, at page 794.

²⁶⁷ Discussed earlier under consumer issues.

²⁶⁸ Discussed in chapters 3.

²⁶⁹ Op. cit. footnote no. 197, at page 55.

²⁷⁰ Op. cit. footnote no. 195.

²⁷¹ Op. cit. footnote no. 213, at page 14.

²⁷² As was the case for the Uruguay Round Ministerial Agreements pursuant to Article 2(b) of the Uruguay Round Final Act.

consumer protection could also be lightened with some clarity on the WTO's approach to the precautionary principle. This may however prove problematic given the differing "social/cultural tolerances for certain risks"²⁷³ amongst its member states, as epitomised by the US Supreme Court's ruling in *Industrial Union Dept. v. American Petroleum Inst.*²⁷⁴ The problematic relationship between the Cartagena Protocol and the WTO SPS and TBT Agreements, and the lack of clarity as to how that relationship will resolve itself,²⁷⁵ added to the lack of clarity as to the status of the precautionary principle within the WTO legal order, will all add to complexity as to how the currently unclear EC definition of the precautionary principle will be interpreted for the purposes of the EC implementation of the Cartagena Protocol on Bio-safety within the EC legal framework.

The Doha Ministerial declaration,²⁷⁶ for its part, in the lead up to the World Summit on Sustainable Development²⁷⁷ encouraged "efforts to promote cooperation between the WTO and relevant international environmental and developmental organisations".²⁷⁸ The current Millennium round of negotiations is to include negotiations on the "relationship between existing WTO rules and specific trade obligations set out in" MEAs.²⁷⁹ These negotiations are however to be limited in scope, concentrating on the "applicability of ... existing WTO rules as among parties to the MEA in question", without prejudicing the rights of WTO members not parties to such MEAs. Such direction as is encompassed in the parameters of the discussions on WTO/MEA relationships opens up a series of interesting possible outcomes to these negotiations, with one possibility being of MEA's providing a *lex specialis* for acceding member states, within the WTO framework. The usual practice in reading WTO and MEA agreements is to

²⁷³ Op. cit. footnote no. 213, at page 17.

²⁷⁴ *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 60 (1980).

²⁷⁵ Op. cit. footnote no. 197, at page 55.

²⁷⁶ Doha WTO Ministerial 2001: Ministerial declaration WT/MIN(01)/ DEC/1 20 November 2001.

²⁷⁷ Held in Johannesburg, South Africa, in September 2002.

²⁷⁸ At point 6 of the declaration.

²⁷⁹ At point 31 of the declaration.

interpret them “in a mutually supportive way”.²⁸⁰ However, as pointed out by Prévost, “it is possible that unavoidable conflicts may arise”.²⁸¹

The CTE has been caught between the conflicting values between states on the issue of the environment,²⁸² with developing countries requiring focus on the “trade impacts of environmental measures” and not on the “environmental aspects of trade rules”.²⁸³ The development of a WTO policy on the environment, or even on a more restricted focus, of the interaction of environmental measures with global trade, suffers from a lack of a strategic steer, with state representatives at the WTO being mercantilist rather than neo-liberal in their outlook.²⁸⁴ In the absence of such a strategic overview at the WTO, with an absence of GATT input into the “design stages of environmental policies”, thereby bringing to global environmental regulation “a moderating influence from the trade policy point of view”,²⁸⁵ the issue of global regulation of the environment has been left to the United Nations Environmental Programme (UNEP), and its Multilateral Environmental Agreements (MEAs), with “fewer detailed rules and less judicialized enforcement regimes”.²⁸⁶

The Cartagena Protocol on Biosafety,²⁸⁷ for its part, has recently attempted to address the issue of a diversity of sites for the regulation of trade and environmental issues, by stating in its preamble,²⁸⁸ that it is “recognising that trade and environment agreements should be mutually supportive with a view to achieving sustainable development” which is supported by the phrase²⁸⁹

²⁸⁰ Ibid. at page 55.

²⁸¹ Ibid. at page 55.

²⁸² Shaffer, Gregory C.; “If only we were elephants”: The political economy of the WTO’s treatment of trade and environment matters. Ch 12. of Kennedy and Southwick: *The Political Economy of International Trade law*, essays in Honour of Robert E. Hudec, Cambridge University Press, 2002, at page 359 et seq.

²⁸³ Ibid. at page 359.

²⁸⁴ Ibid. at page 353.

²⁸⁵ Ibid. at page 359.

²⁸⁶ Ibid. at page 360.

²⁸⁷ Montreal 2000.

²⁸⁸ At recital no. 9.

²⁸⁹ At recital no. 11.

“understanding that the above recital is not intended to subordinate this Protocol to other international agreements”. This is seen as an attempt “to establish the relationship between the Protocol and the WTO”, making it clear that “the WTO and MEAs are separate but equal bodies of international law.”²⁹⁰

The current relationship between WTO trade law and the environmental provisions within the WTO framework, and in international environmental agreements, is a particularly thorny issue, as it is perceived that “all environmental measures have economic effects and all trade measures affect the environment”.²⁹¹ In addition there is a need to examine the Article XX GATT 47 exceptions in light of current environmental issues. As Howse has stated, the issue is whether under current “available scientific evidence” whether a resource is running out now, giving rise to a member’s “legitimate reason today for taking trade-restricting measures”, and not “because it was thought to be running out more than half-century earlier!”.²⁹² The WTO Committee on Trade and Environment (CTE) was “established in 1995 by a Ministerial Decision at the end of the Uruguay Round”, with a mandate to “identify the relationship between trade measures and environmental measures to promote sustainable development”²⁹³ and “to make recommendations on whether any modifications to WTO provisions are required with respect to the three pillars” of the WTO,²⁹⁴ goods, (of which agriculture forms part), services, and intellectual property, (both of which also interact with agriculture, to varying degrees). As pointed out by Shaw and Schwartz, the CTE has, to date, “focused on identifying the relationship between trade and environmental measures”.²⁹⁵

²⁹⁰ Shaw, Sabrina and Schwartz, Risa; Trade and Environment in the WTO; State of Play, JWT 2002, 36(1), 129-154, at page 137.

²⁹¹ Op. cit. footnote no. 282, at page 359.

²⁹² Howse, Robert; The Appellate Body Rulings in the *Shrimp/Turtle* Case: A new Legal Baseline for the Trade and Environment Debate; Columbia Journal of Environmental Law [Vol. 27:2 2002], at page 503.

²⁹³ Op. cit. footnote no. 290, at page 130.

²⁹⁴ Ibid. at page 130.

²⁹⁵ Ibid. at page 130.

One anticipated outcome of these negotiations is set out in the Doha Ministerial declaration as being “the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services”.²⁹⁶ The Committee on Trade and Environment (CTE) was further instructed in the Doha Ministerial declaration to give particular attention to the “effect on environmental measures on market access”, with particular regard for developing and least-developed countries, the impact of possible provisions on the TRIPs agreements, and the issue of “labelling requirements for environmental purposes.”²⁹⁷ The CTE was to have reported back to the 5th ministerial conference.²⁹⁸ Unfortunately the Cancún conference concluded without consensus, with the “July package” merely referring to reports of the Negotiating Group on rules, the Special Session on the committee on Trade and Environment, and the Special Session of the Council for TRIPs, presumably as a result of a lack of consensus to date on these issues. Early indications as to how matters under this heading will resolve themselves will have to await the conclusion of the 6th ministerial conference.²⁹⁹

Another interesting legislative development, this time the US’s Bioterrorism Act³⁰⁰ could equally give rise to WTO litigation, given its requirements for all food consignments into the US to be notified to the US Food and Drug Administration,³⁰¹ together with the added documentation requirements of the food trade chain. As the US did not, in drafting this legislation, keep in mind the WTO TBT or SPS Agreement, it is possible, as pointed out by Prévost that this “may become the subject of a dispute at the WTO”. She goes on to query whether such a dispute would be raised under the TBT, the SPS, or under GATT 1994 itself. We can anticipate interesting times ahead under the topic of health and consumer issues in the international trade of agricultural goods.

²⁹⁶ At point 31(iii) of the declaration.

²⁹⁷ At point 32 of the declaration.

²⁹⁸ Held at Cancun Mexico, 10th to 14th September 2003.

²⁹⁹ Which is to be held at the end of 2005, in Hong Kong.

³⁰⁰ United States enacted the Public Health, Security and Bioterrorism Preparedness Act (Bioterrorism Act) of the 12 June 2002.

³⁰¹ *Op. cit.* footnote no. 197, at page 50.

In the WTO – Environmental law debate, one of the most controversial issues is “process and production methods”, or as Charnovitz refers to them, “PPMs”.³⁰² It is the method of production of a particular internationally traded commodity which has been at issue in the non-agricultural *Shrimp/Turtle*³⁰³ and *Tuna/Dolphin*³⁰⁴ cases, and which is now coming to the fore in the GM debate. The process of fishing for shrimp, which was had not “been certified as having regulatory regimes in place to prevent the killing of sea turtles”,³⁰⁵ and the similar argument as to “differences in harvesting technique” which arose in the *Tuna/Dolphin*,³⁰⁶ are familiar to WTO lawyers. As Charnovitz points out it is products which are compared, rather than “policies or practices of the importing state and the state of origin” under Article III GATT 47.³⁰⁷ However, the reality of the implementation of the US rules on the import of shrimp was leading to shrimp “caught using methods identical to those employed in the United States” were being excluded simply because they had “not been certified by the United States”, leading the Appellate Body to conclude that the US was more interested in changing policy of other states, rather than the “stated objective of protecting and conserving sea turtles”.³⁰⁸ It was therefore held that the US measures in the *Shrimp* case did “not fall within the scope of Article XX”.³⁰⁹ As pointed out by Scott, however, the panel did point out, that while the focus of the WTO Agreements was the “promotion of economic development through trade” that environmental considerations were “important for the interpretation of the WTO Agreement”.³¹⁰

³⁰² Charnovitz, Steve; the Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality, *The Yale Journal of International Law* [Vol. 27: 59 2002] page 59.

³⁰³ *U.S. – Import Prohibitions of Certain Shrimp & Shrimp Products*, WT/DS58/AB/R

³⁰⁴ *GATT Dispute Panel Report on U.S. restrictions on Imports of Tuna*, Sept. 3, 1991, GATT B.I.S.D. (39th Supp.).

³⁰⁵ Op. cit. footnote no. 302, at page 59.

³⁰⁶ Op. cit. footnote no. 196, at page 135.

³⁰⁷ Ibid. at page 135.

³⁰⁸ Ibid. at page 140.

³⁰⁹ Op. cit. footnote no. 196, at page 136.

³¹⁰ Op. cit. footnote no. 196, at page 136.

Charnovitz is of the opinion that properly implemented process and production methods would be permissible at the WTO, despite that continuing insistence of the WTO Secretariat that “PPMs violate trade rules”.³¹¹ He points out that for agricultural commodities, that the WTO Agreement on Agriculture states that payments for environmental programmes “must be dependent on specific conditions” to include those dealing with “production methods or inputs”,³¹² having originated as a concept from the 1979 version of Technical Barriers to Trade”, which “focused on the production method rather than product characteristics.”³¹³ He divides PPMs into product-related and non-product-related PPMs,³¹⁴ stating that the TBT would appear to “cover product-related PPMs,” but “does not address other PPMs,”³¹⁵ which would appear to be more correctly addressed by the SPS, with its focus on the protection of “life or health within the territory of the importing country”.³¹⁶

Returning to the issue of genetically modified organisms, the debate here is on the process and production method of the particular commodity. As Scott has pointed out, referring to the proposal for an EC regulation on GM food and feed, the proposed European provisions on GM crops covers not only concerns as to “the protection of human health and the environment” but also “a number of additional objectives, including animal health and welfare, and consumer protection defined broadly.”³¹⁷ She points out that while the precautionary principle is not explicitly written into these proposals, Article 1 refers to the “general principles laid down in the EFSA regulation”³¹⁸ with Article 7 of that regulation identifying the precautionary principle. The precautionary principle

³¹¹ Op. cit. footnote no. 302, at page 78.

³¹² Ibid. at page 61.

³¹³ Ibid. at page 64.

³¹⁴ Ibid. at page 65.

³¹⁵ Ibid. at page 65.

³¹⁶ Ibid. at page 100.

³¹⁷ Scott Joanne; European regulation of GMOs and the WTO; (2003) 9 Columbia Journal of European Law, 213, at page 127.

³¹⁸ Regulation 178/2002, 2002 OJ (L31) 1.

will “therefore enter through the backdoor”,³¹⁹ bringing us back to the issue as to how to interpret this principle in light of WTO commitments.

7. Agricultural, Rural and Environmental law synergies

The juxtaposition of EC Agricultural law, EC Environmental law and EC Rural law appears to be developing synergies at the EC level, while the same nexus at the WTO between trade in agricultural commodities and environmental concerns remains tense. The comprehensive rewriting of the CAP under the mid-term review, to include the requirement for any payments to be made subject to meeting the “good agricultural and environmental condition” standards (GAEC), matches the aspirations contained, and the statements of intention set out in the Sixth Community Environment Action Programme, provides a challenging but clear basis for the future production of agricultural produce. This, allied to the potential of a more robust and independent EC Regional policy (independent of the CAP), could be developed to meet the needs of the rural community. These changes in the CAP have, as one of their main driving forces, the need to comply with the WTO Agreement on Agriculture through the decoupling of payments to farmers. The replaced policy, environmentally motivated, including the Integrated Product Policy (IPP), as has been shown, may however, encounter problems at the WTO regulatory level. This arises from the inherent tensions that continue to exist between trade and agriculture at the WTO, and between the WTO and the MEAs. The lack of a “comprehensive general agreement on the protection of the environment similar to the WTO Agreement for the world trading system” remains a problem,³²⁰ together with the lack of “a specialized compulsory jurisdiction for the settlement of environmental disputes,”³²¹ despite the

³¹⁹ Op. cit. footnote no. 317, at page 219.

³²⁰ Petersmann, Ernst-Ulrich; *Alternative Dispute Resolution - Lessons for the WTO*, Ch. 2 in Friedl Weiss (ed.) *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the practice of Other International Courts & Tribunals* (Cameron May, London, 2000), at page 38 et seq.

³²¹ Ibid. at page 39.

establishment of an environmental matters chamber at the International Court of Justice, which has not proven popular with states, with “only very few cases submitted” arising from or involving international environment harm.³²² How these two levels of governance will resolve the tensions between these issues, given the different interactions between these policies at the EC and the WTO, in the absence of greater clarity on the issue arising from new documentation that may emanate from the current round of negotiations at the WTO, remains to be seen, particularly as many environmental disputes are “characterized by scientific uncertainty”,³²³ which is tackled by the EC on the basis of the “precautionary principle”.

8. Existing and future WTO situation

An analysis of the future direction of WTO law in the area of agriculture is more problematic than one that focuses on the future direction of the EC law on agriculture, as the Millennium round of WTO negotiations is still ongoing,³²⁴ with few of the key issues in this area being subject to even interim agreement to date. Only the Cancún decision, otherwise known as the “July package”,³²⁵ on modalities, and the *ad-valorem* equivalents agreement³²⁶ of May 2005,³²⁷ have to date been forthcoming. This has resulted in a consequential lack of clarity on the future reflexive relationship between the two levels of governance in this commodity area. Indications as to future developments can however be gleaned from the current Agreement on Agriculture, in particular from the expiry of the

³²² Ibid. at page 39.

³²³ Ibid. at page 40.

³²⁴ With cotton being negotiated on separately, as “members’ views differ as to whether it should be negotiated under agriculture or in some other part of the negotiating structure”. WTO Agriculture Negotiations; the issues, and where we are now, updated 1 March 2004, <http://www.wto.org>.

³²⁵ Decision adopted by the General Council on 1st August 2004, WT/L/579.

³²⁶ Reached at the WTO Mini-Ministerial Meeting in Paris on *ad valorem* equivalents on the 4th May 2005.

³²⁷ The Doha Development agents: WTO trade talks agreed on EU proposals to move forward agriculture talks, Paris, 4 May 2005, available on the Europa Website at <http://europa.eu.int>, under European Commission – trade issues – news.

peace clause, contained in Article 13 of the Agreement on Agriculture.³²⁸ What can be anticipated however, are developments pursuant to the currently in force Agreement, in particular the possible continuing impact of the expiry of the peace clause, (contained in Article 13 of the WTO Agreement on Agriculture) as discussed in chapter 7, together with a more in depth analysis of possible future developmental trajectories for Article 20.c of the Agreement, which deals with non-trade concerns. These are to be taken into consideration in the continuation of the reform process, which is currently subject to negotiation under the Millennium round of negotiations.

The exact legal nature of the Agreement on Agriculture *vis à vis* the balance of the Annex 1A agreements, in particular the Subsidies and Countervailing Measures Agreement, in light of the expiration of the Article 13 peace clause, has yet to be established. As stated by Siuves, the current lack of addressing of the expiration of the Peace Clause, “widens the scope of the legal possibilities for challenging the violation of rules concerning agricultural export subsidies”.³²⁹ As elaborated on in chapter 7, Chambovey’s³³⁰ distinction between the Agreement on Agriculture’s “*lex specialis*” status, or cumulative approach to the Annex 1A agreements, whereby all GATT provisions are to apply to agricultural commodities, only to the extent that the Agreement on Agriculture does not provide an alternative specific provision, will have a radical impact on the development on the global trade in agriculture in future years, given the “intrinsic disruptive role played by agricultural export subsidies on the international (agricultural) trade market”, even in the absence of a Millennium Round agricultural agreement, or amendments to the existing agreement.³³¹

³²⁸ Which was discussed at length in chapter 7.

³²⁹ Siuves, Humberto N.; The Expiry of the Peace Clause on Agricultural Export Subsidies – the Outlook Post-Cancun, Legal issues of Economic Integration 31(1): 25-42, 2004, at page 40.

³³⁰ Chambovey, Didier; "How the Expiry of the Peace Clause (article 13 of the WTO Agreement on Agriculture) Might Alter Disciplines on Agricultural Subsidies in the WTO Framework, Journal of World Trade 36(2): 302-352, 2002, at page 310.

³³¹ Op. cit. footnote no. 329, at page 41.

The Millennium round of negotiations has however opened,³³² with the agricultural negotiations being conducted pursuant to Article 20 of the Agreement on Agriculture. Proposals on agriculture had been submitted by 121 governments to the Doha Ministerial Conference,³³³ with the most substantive document issuing from these negotiations being the Cancún decision, otherwise known as the “July package”,³³⁴ with further developments anticipated at the Hong Kong ministerial, due to be held in December 2005.³³⁵ Agreements have been reached to date on the intention to “abolish all forms of agricultural export subsidies”,³³⁶ the date of which has yet to be established, together with the intention to “set new rules” to streamline trade and customs procedures.³³⁷ More substantially modalities have been agreed, to include framework formulas, for the reduction of import barriers, export subsidies and domestic support measures.³³⁸ Substantial reductions of the overall level of trade-distorting support “from bound levels” is anticipated from each WTO member state,³³⁹ with changes currently under negotiation for both the blue box and green box classification of payments. In addition the possibility of different rules for sensitive products has been allowed for in the July package,³⁴⁰ which also provides that there will be enhanced monitoring and surveillance of the implementation of the provisions of the Agreement on Agriculture.³⁴¹ These changes, when finalised, will have to be read in light of developments in parallel negotiations on the balance of the Annex 1A documents, in order to establish the full impact of the Millennium round of changes.

³³² With negotiations having started early in 2000.

³³³ November 2001.

³³⁴ Decision adopted by the General Council on 1st August 2004, WT/L/579.

³³⁵ After the date of submission of this PhD thesis.

³³⁶ WTO News: 2004 News Items. DDA July 2004 Package: meeting summary 31 July Round – the –clock meetings produce “historic” breakthrough, (http://www.wto.org/english/news_e/news04_e/dda_package_sum_31july04_e.htm).

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ Text of the “July package” – the general Cancún decision, Decision adopted by the General Council on 1 August 2004 WT/L/579, Annex A Framework for Establishing Modalities in Agriculture, (http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm).

³⁴⁰ Ibid.

³⁴¹ Ibid.

Of interest is the reference to “non-trade concerns, special and differential treatment to developing country members, and the objective to establish a fair and market-orientated agricultural trading system, and the other objectives and concerns mentioned in the preamble to this Agreement” provided in Article 20.c of the Agreement on Agriculture. Debate has been ongoing as to the exact encompass of the phrase “non-trade concerns” since the coming into force of the Uruguay Round treaty texts. The “July package”, at paragraph 2, refers to the non-trade concerns “as referred to in paragraph 13 of the Doha Declaration” which will “be taken into account”³⁴² in the ongoing negotiations. For its part, the Doha Declaration, at point 13, dealing with Agriculture, states that the WTO takes “note of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirms that non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture”.³⁴³ It would appear from that the reading of the July package that it is the non-trade concerns of developing countries which will be taken into account, while the Doha Declaration would appear to reflect the non-trade concerns of all of the WTO member states, thereby bringing into consideration the multifunctionality and rural development position of the EC at these negotiations.³⁴⁴

The above negotiations are being conducted against a backdrop of continuing debate as to the constitutional and institutional challenges for the WTO. The lack of progress of negotiations at the multilateral level has resulted in

³⁴² Ibid.

³⁴³ DOHA WTO Ministerial 2001: Ministerial declaration WT/MIN(01)/DEC/1 20 November 2001.

³⁴⁴ Opinion of the Committee of the Regions on: the 'Proposals for Council Regulations (EC) concerning the reform of the common agricultural policy': ' Council Regulation (EC) on the financing of the common agricultural policy'; ' Council Regulation (EC) amending Regulation (EEC) No 1766/92 on the common organization of the market of cereals and repealing Regulation (EEC) No 2731/75 fixing standard qualities for common wheat, rye, barley, maize and durum wheat'; 'Council Regulation (EC) establishing a support system for producers of certain arable crops'; 'Council Regulation (EC) on the common organization of the market in beef and veal'; 'Council Regulation (EC) on the common organization of the market in milk and milk products'; 'Council Regulation (EC) amending Regulation (EEC) No 3950/92 establishing an additional levy in the milk and milk products sector'; 'Council Regulation (EC) establishing common rules for direct support schemes under the common agricultural policy'; ' Council Regulation (EC) on support for rural development from the European Agriculture Guidance and Guarantee Fund (EAGGF)' CdR 273/98 fin, Official Journal C 93, 06/04/1999 p. 1, at page 2 et seq.

“resort to bilateral and regional trade agreements” as a default mechanism for progressing trade interests, with, for example, the US announcing that “it would move ahead with “will do” countries on a bilateral basis, leaving others behind”.³⁴⁵ This development is reflected in the recent report of the Consultative Board set up by the now former WTO Director General Supachai Panitchpahdi.³⁴⁶ Looking at the reality of the operation of the WTO treaty texts, rather than the idealism of their content, the Consultative Board has been critical of the “spaghetti bowl” of discriminatory preferences that have been operating in practice,³⁴⁷ and the “current spread of Preferential Trade Agreements”,³⁴⁸ contrary to the MFN concepts enshrined in the WTO treaty texts. In addition the reaction of WTO member states to panel and Appellate Body rulings is, in the eyes of the Consultative Board, “worrisome”.³⁴⁹ The view that member states can “buy out” of their obligations is seen as being “harmful to the system”. As discussed in chapter 7, the view that the development of the WTO from GATT 1947 as being the “most successful example of the “constitutionalisation” of a worldwide organization”,³⁵⁰ is still clearly not without its problems, with the Consultative Board being concerned with the still held view that the WTO is a rule-orientated rather than rule based system. Apparently strongly influenced by the development of the EC, the Consultative Board sees the WTO as a “*sui generis* international organization”,³⁵¹ advocating that the “role of the Secretariat as guardian of the WTO system should be reaffirmed”.³⁵²

³⁴⁵ Op. cit. footnote no. 329, at page 26.

³⁴⁶ The Future of the WTO – Addressing institutional challenges in the new millennium; report by the Consultative Board to the Director – General Supachai Panitchpahdi, WTO 2004. at <http://www.wto.int>.

³⁴⁷ At point 3 of the report.

³⁴⁸ At point 1 of the report.

³⁴⁹ At point 22 of the report.

³⁵⁰ Petersmann, Ernst-Ulrich; Constitutionalism and WTO law: From a state-centred approach towards a human rights approach in international economic law, Ch 2. in Kennedy and Southwick: The Political Economy of International Trade law, essays in Honour of Robert E. Hudec, Cambridge University Press, 2002, at page 51.

³⁵¹ At point 7 of the report.

³⁵² At point 36 of the report.

A process of the strengthening of the governance of the WTO is advocated, with the recommendation that the WTO Secretariat should be encouraged to generate “a greater intellectual output and policy analysis”,³⁵³ with “meaningful increases” of the WTO budget to be made, by way of “annual growth rates in excess of other better funded institutions”.³⁵⁴ If these suggestions are taken on board in the current round of negotiations, together with the recommendations that the WTO develops a “set of clear objectives for the WTO’s relations with civil society and the public at large”,³⁵⁵ and in particular with least developed countries,³⁵⁶ these may well contribute to the development of the “proto-constitution”³⁵⁷ advocated by Ladefoged Mortensen, as discussed earlier in this thesis.³⁵⁸ The Consultative Board is however quite clear that the WTO should focus exclusively on being a forum for trade negotiations,³⁵⁹ with official WTO observer status only being allocated to other organisations only on the basis that they can contribute to trade negotiations. However, as a counter balance, it does recommend that, in an effort to develop transparency at the WTO, the panel and Appellate Body hearings should be generally open to the public, with a disputing party having to show “good and sufficient cause” to exclude members of the public from all or part of a hearing.³⁶⁰ These recommendations would therefore reject the suggestion of Jackson that the WTO should become the locus of “additional inter-national coordinating power” outwith its trade mandate.³⁶¹ Co-operation with “other intergovernmental agencies” is however recognised as a method of adding value and legitimacy to WTO activities.³⁶²

³⁵³ At point 36 of the report.

³⁵⁴ At point 37 of the report.

³⁵⁵ At point 12 of the report.

³⁵⁶ At point 13 of the report.

³⁵⁷ Mortensen, Jens Ladefoged; *The Institutional Requirements of the WTO in an Era of Globalisation: Imperfections in the Global Economic Polity*, E.L.J. 2000, 6(2), 176-204, at page 203.

³⁵⁸ In chapter 7.

³⁵⁹ At point 7 of the report.

³⁶⁰ At point 21 of the report.

³⁶¹ Jackson, John H.; *Sovereignty, subsidiarity, and separation of powers: the high-wire balancing act of globalisation*, Ch 1. in Kennedy and Southwick: *The Political Economy of International Trade law*, essays in Honour of Robert E. Hudec, Cambridge University Press, 2002, at page 31.

³⁶² At point 6 of the report.

9. Intellectual Property and Agriculture

9.1 Introduction

Less currently contentious than the relationship between the EC and the WTO in the area of health and consumer issues, but with plenty of potential for conflict in the future, the issue of the interaction of the various Intellectual Property regimes operating within the EC and at a global level is a PhD thesis in itself. The best that can be done in this part of this thesis is to provide a brief sketch of some of the aspects of the WTO and European intellectual property regimes as they interact with the EC and WTO agricultural regimes, and leave for future researchers the in-depth analysis of same.

The WTO TRIPs Agreement, like GATT 1994 and its allied agreements, engendered a debate as to whether it had direct effect within EC law, with the TRIPs specific arguments to the effect that intellectual property rights are “private rights”, owned by individuals. Like the GATT agreements, the pillars of TRIPs are the MFN and NT concepts,³⁶³ allocated on the basis of nationality,³⁶⁴ which it is argued would be “best defended by their owners”.³⁶⁵ Despite the fact that earlier International law treaties, the Paris Convention³⁶⁶ and the Berne Convention³⁶⁷ had been granted direct effect by the EC, the ECJ, (for the same

³⁶³ It should be noted that national treatment is subject to the exceptions provided for in the Paris Convention, under Article 3 TRIPs. Talia Einhorn; The impact of the WTO Agreement on TRIPs (Trade-Related Aspects of Intellectual Property Rights) on EC law: A challenge to regionalism, 35 Common Market Law Review, 35; 1069-1099, 1998, at page 1069.

³⁶⁴ Einhorn, Talia; The impact of the WTO Agreement on TRIPs (Trade-Related Aspects of Intellectual Property Rights) on EC law: A challenge to regionalism, 35 Common Market Law Review, 35; 1069-1099, 1998, at page 1072.

³⁶⁵ Ibid. at page 1097.

³⁶⁶ Paris Convention for the Protection of Industrial Property of 1883-1967.

³⁶⁷ Berne Convention for the Protection of Literary and Artistic Works of 1886 (latest version Paris, 1971).

reasons as for the GATT agreements), has continued to deny direct effect to the TRIPs Agreement within the EC legal jurisdiction.³⁶⁸

The interaction between TRIPs and the other WTO agreements has also given rise to much academic speculation, in light of Article XX(d) GATT, which provides an exemption for *inter alia*, intellectual property. The conclusion drawn by Bronckers is that “TRIPs is a *lex specialis* or *sui generis*,” with its provisions gaining “absolute precedence over the GATT”.³⁶⁹ The failure of TRIPs to address the issue of the exhaustion of rights³⁷⁰ has however led to the possibility of GATT provisions re-entering the fray,³⁷¹ but the consensus of opinion appears to be that the issue of the exhaustion of rights has been left with the member states of the WTO to decide, either on the basis of national or regional exhaustion of rights, as is the case in the EC.

It is interesting to note that the ECJ in *Opinion 1/94*³⁷² held that the “primary objective of TRIPS is to strengthen and harmonize the protection of intellectual property on a world-wide scale.”³⁷³ The “strengthening” of intellectual property rights “amounts to increased trade restrictions”³⁷⁴ as Intellectual Property protection is now “upgraded in the WTO” *vis à vis* GATT 1947.³⁷⁵ The barring of the import of products from countries where compulsory patents have been awarded continues to be permitted under TRIPs.³⁷⁶ As pointed out by Bronckers, a liberalisation of the trading regime in intellectual property would have resulted in the granting of international exhaustion rights under TRIPs.³⁷⁷ This has not happened. In fact, TRIPs has strengthened intellectual property rights globally, by

³⁶⁸ Op. cit. footnote no. 364, at page 1097 et seq.

³⁶⁹ Bronckers, Marco C.E.J.: The Exhaustion of Patent rights under WTO law, JWT 32(5) 137-159, 1998, at page 143.

³⁷⁰ In Article 6 TRIPs.

³⁷¹ Op. cit. footnote no. 369, at page 158.

³⁷² *Opinion 1/94 (re WTO Agreement)* [1994] ECR I-5267.

³⁷³ Op. cit. footnote no. 369 at page 151, referring to paragraphs 57-58, of the ruling in *Opinion 1/94*.

³⁷⁴ Ibid. at page 144.

³⁷⁵ Ibid. at page 150.

³⁷⁶ Op. cit. footnote no. 364, at page 1085.

³⁷⁷ Op. cit. footnote no. 369, at page 157.

requiring member states of the WTO to put in force sufficiently robust legal regimes to meet its requirements, but in addition TRIPs also permits WTO member states to “adopt measures that provide for more extensive protection” than is required under TRIPs.³⁷⁸ As Einhorn points out the possibility of barring goods manufactured under a compulsory patent licence “proves that there is no need for harmonisation” of intellectual property law under TRIPs.³⁷⁹

Unlike goods however, intellectual property is not fully embedded as a policy within EC competence, as since *Opinion 1/94* both the EC and its member states are “jointly parties to TRIPs”.³⁸⁰ The EC has exclusive competence to deal with the import of counterfeit goods, however there is a lack of clarity as to where otherwise to draw the line with regard the competence of the EC and its member states. Some attempt was made to address this issue with the Nice amendment to Article 133 EC. This provides that “the Council shall act unanimously when negotiating or concluding an agreement” with unanimity also required “for the adoption of internal rules or where it related to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules.” The provisions of Article 133 EC have been substantially re-incorporated into Article III-315 of the Constitution for Europe. With this continuing requirement for unanimity with regard to intellectual property aspects of the CCP, the exact delimitation of the transfer of sovereignty to the EC on this matter remains unclear.

The areas of intellectual property most relevant to agriculture are patents, plant varieties, and geographical indications. The failure of the Community Patent Convention³⁸¹ to come into force has an impact on EC Agricultural law. The non-

³⁷⁸ Op. cit. footnote no. 364, at page 1094.

³⁷⁹ Ibid. at page 1094.

³⁸⁰ Ibid. at page 1077.

³⁸¹ Also known as the Luxembourg Convention on a Community Patent 1975, [1976] O.J. L17, which has since been followed up by a Proposal for a Council Regulation on a Community Patent, OJ C337E, of the 28/11/2000, p.278, which has not yet given rise to the passing of any regulation on this topic.

EC Munich Convention on the grant of a European Patent (EPC)³⁸² set up the European Patent, issued by the European Patent Office, and operates one source of a patent within the EC. National patents also continue to remain in force. The two main areas of protection of intellectual property of living things, plant patents and plant varieties, also exhibit a problematic boundary delineation.

9.2 Plant Patents and Varieties

With regard to the intellectual property aspects of plants, TRIPs provides, at Article 27.1 that patents should be available “in all fields of technology”, subject to public order or morality, to include the protection of “human, animal or plant life or health or to avoid serious prejudice to the environment”.³⁸³ It should be noted that “moral disapproval by some sections of the community” is not a TRIPs exception.³⁸⁴ Article 27.3 TRIPs does provide that WTO member states may exclude from patentability treatment for animals, and “essentially biological processes for the production of plants or animals other than non-biological and microbiological processes”. If such an action is taken by a WTO member state they have to provide “for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof”.³⁸⁵ This allows for the Plant Variety Right system as operated by the EC.³⁸⁶ Roberts is of the opinion that this drafting appears to favour the use of patents for plant varieties.³⁸⁷ It should be noted that micro-organisms are not exempted by TRIPs, and are to be covered by patent systems.

The European Patent Convention (EPC) for its part provides at Article 53 that European patents will not be granted for “plant or animal varieties or essentially biological processes” or their production. Patents will however be granted for

³⁸² Of the 5th October 1973.

³⁸³ Article 27.2 TRIPs.

³⁸⁴ Roberts, Tim; Patenting Plants around the World, EIPR 1996, 18(10), 531- 536, at page 535.

³⁸⁵ Article 27.3.b TRIPs.

³⁸⁶ This provision is currently under review pursuant to paragraph 19 of the 2001 Doha Declaration.

³⁸⁷ Op. cit. footnote no. 384, at page 539.

microbiological processes or products. There is no separate registration system for animal varieties. The definition of “plant variety”,³⁸⁸ the demarcation line between patents for plants, and the requirement for the registration of a plant variety has had varied definitions under the two regimes.³⁸⁹ The UPOV convention³⁹⁰ provides the “central model” for plant varieties,³⁹¹ which has been followed in the EC’s Council Regulation 2100/94 on Community Plant Variety Rights,³⁹² operating through the Community Plant Variety Office in Angers, France. Plant variety rights had been unpopular until the coming into force of the 1991 revised version of the UPOV, which strengthened and lengthened the protection of plant varieties,³⁹³ with trees and vines now covered for 25 years, and other species, 20 years, bringing them in line with the patent system protection. Farm saved seed can be replanted on the same farm under the UPOV³⁹⁴ in certain (traditional) crops.³⁹⁵ This has been echoed in the EC directive under Article 14, with small farmers not being required to remunerate the holder of the plant variety for this practice. Large farmers are, however, required to “pay an equitable remuneration to the holder” for such a practice.³⁹⁶

³⁸⁸ It is provided in the Plant variety directive that a variety must be distinct, uniform, stable, new and have an approved variety denomination, allocated by the Community Plant Variety Office, and that the variety must not “degenerate when it is reproduced” (Millett, Timothy; *The Community System of Plant Variety Rights*, ELRev. 1999, 24(3), 231-258, at page 236). However the use of the term by the European Patent Office has not always matched this definition.

³⁸⁹ Funder, Joshua V.; *Rethinking Patents for Plant Innovation*. EIPR 1999, 21(11), 551-577, at page 556 et seq.

³⁹⁰ International Convention for the Protection of New Varieties of Plants, which was signed in Paris in 1961.

³⁹¹ Op. cit. footnote no. 389, at page 551.

³⁹² Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, Official Journal L 227, 01/09/1994 p. 1, which is supplemented by Commission Regulation (EC) No 1238/95 of 31 May 1995 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards the fees payable to the Community Plant Variety Office, Official Journal L 121, 01/06/1995 p. 31, Commission Regulation (EC) No 1239/95 of 31 May 1995 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office, Official Journal L 121, 01/06/1995 p. 37, Commission Regulation (EC) No 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14 (3) of Council Regulation (EC) No 2100/94 on Community plant variety rights, Official Journal L 173, 25/07/1995 p. 14, all as subsequently amended.

³⁹³ Millett, Timothy; *The Community System of Plant Variety Rights*, ELRev. 1999, 24(3), 231-258, at page 233.

³⁹⁴ Article 15 UPOV 1991.

³⁹⁵ to include certain fodder plants, cereals, potatoes and oil and fibre plants.

³⁹⁶ Op. cit. footnote no. 393, at page 240.

The second line of intellectual property rights with regard to plants is patents. The patentability of plants has caused problems for some years, as plants cannot be “manufactured wholly by man”³⁹⁷ in contrast to a machine, and plants themselves are subject to “spontaneous genetic variation”, with any purchaser of a plant, as well as the plant itself, being in a position to reproduce from it. As stated by Flounder “plants do not fit easily within patent principles”.³⁹⁸ Whole plants, therefore, are excluded from the patent process, though under Article 53(b) of the EPC “components and parts of plants may be the valid subject-matter of a patent”,³⁹⁹ with both biological products and processes involving plants now being patentable.⁴⁰⁰ Genetically engineered plants were refused a patent in the *Novartis* case,⁴⁰¹ which effectively requested a patent for a new plant variety. The Enlarged Board of the EPO in this case did find that inventions which were not covered by plant variety rights could be patented, if they otherwise met the requirements of patent law.⁴⁰² This approach is reflected in the EU Biotechnology Patenting Directive, which only covers plants.⁴⁰³ *Novartis* is also the case which recognised the patentability of transgenic plants, which had been deemed to be unpatentable until then.⁴⁰⁴ In the absence of specific laws dealing with animals, only the patent system is available, however, as has been pointed out by Schertenleib, “transgenic animals are not animal varieties”.⁴⁰⁵

In order to address the issues which might arise as a result of the simultaneous operation of the patent system over plants, and plant variety rights, Article 12 of the EC Biotechnology Directive provides for a compulsory licence in one system,

³⁹⁷ Ibid. at page 231.

³⁹⁸ Op. cit. footnote no. 389, at page 554.

³⁹⁹ Ibid. at page 568.

⁴⁰⁰ Ibid. at page 565.

⁴⁰¹ Case: *Novartis*/ Transgenic plant (G01/98) [2000] EPOR 303.

⁴⁰² Case Comment EPO: Patents – Patentability of Plants Tim Roberts, EIPR, 2000, 22(3), N49, at page N49.

⁴⁰³ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, Official Journal L 213, 30/07/1998 p. 13.

⁴⁰⁴ Schertenleib, Dr Denis: the Patentability and Protection of Living Organisms in the European Union; EIPR 2004 26(5) 203-213, at page 204.

⁴⁰⁵ Ibid. at page 211.

if it is required in order to exercise rights under the other system.⁴⁰⁶ Further complications may arise in the interaction of legal systems, as the limitation on the use of genetic material may be affected by the Convention on Biological Diversity.⁴⁰⁷ Concerns as to the maintenance of genetic diversity, and concerns about “biopiracy” may influence the development of the law in this area,⁴⁰⁸ in light of Article 53(a) of the EPC which provides that “patents shall not be granted” for inventions “which would be contrary to *ordre public* or morality”.⁴⁰⁹ This issue is currently being addressed, along with the review of Article 27.3b of TRIPS, under the broadened discussions pursuant to paragraph 19 of the 2001 Doha Declaration.

As TRIPS develops, it will be influenced by perceptions of the WTO member states, amongst them the USA. Similar debates to those in the EC have arisen in the US,⁴¹⁰ however the US solutions have differed from those in the EC, with US plant breeders having complete freedom to choose between plant patents and plant varieties.⁴¹¹ This approach was confirmed in the *Pioneer* case,⁴¹² reaffirming the earlier ruling in *Chackrabarty*,⁴¹³ that utility patents were available for plants, a case which, as pointed out by various commentators, dealt with bacteria and not plants.⁴¹⁴ If patentability of plants gains dominance under TRIPS, as it appears to have done in the US, the patentability of plants has led some to question if farm

⁴⁰⁶ Shillito, Mark, Smith, Joel and Morgan, Gareth; Patenting Genetically Engineered Plants, EPIR, 2002, 24(6), 333-336, at page 335, and Timothy Millett; The Community System of Plant Variety Rights, ELRev. 1999, 24(3), 231-258, at page 242.

⁴⁰⁷ Convention on Biological Diversity (“the Biological Convention”) signed in Rio de Janeiro on 5 June 1992.

⁴⁰⁸ Shillito, Mark, Smith, Joel and Morgan, Gareth; Patenting Genetically Engineered Plants, EPIR, 2002, 24(6), 333-336, at page 336.

⁴⁰⁹ Op. cit. footnote no. 404, at page 204.

⁴¹⁰ The US operates both the Plant Patent Act 1930 and the Plant Variety Protection Act 1970.

⁴¹¹ Op. cit. footnote no. 385, at page 536.

⁴¹² *J.E.M. AG Supply, Inc. (trading as Farm Advantage) v. Pioneer Hi-Bred International, Inc.*, Supreme Court of the United States, December 10, 2001, no. 99-1996, reported at <http://supct.law-cornell.edu/supct/html/99-1996.ZS.html>.

⁴¹³ *Diamond v. Chakrabarty* 65 L.Ed.2d 144 (1980).

⁴¹⁴ Case Comment United States: Patents – Utility Patents, Carson, John, Baumgartner, Marc EPIR 2002, 24(4), N53-54, at page N54.

saved seed can be reused under a patent system, in contrast to the plant variety system.⁴¹⁵

9.3 Geographical indications

A third, but somewhat different area of intellectual property in the area of agriculture, is geographical indications. The EC operates systems of Protected Designations of Origin, (PDO's),⁴¹⁶ Protected Geographical Indications (PGI's)⁴¹⁷ and Traditional Speciality Guaranteed (TSG's),⁴¹⁸ with some querying as to their TRIPs compliance. The development of these registrations reflects the Commission's view that, under CAP reforms the market for agricultural products will be refocusing on quality products rather than the production of "large amounts of subsidised products".⁴¹⁹ The focus is therefore on the development of a quality policy, as well as giving value to both the geographical origin of a product, and its traditional method of production.⁴²⁰ PDOs and PGIs are both legislated for in Regulation (EEC) no. 2081/92, with the intention to protect names, the distinction between the two classifications being "how closely the product is linked to the specific geographical area", with the PDO being more geographically rigorous than the PGI. The PDO registration requires two tests to be met. All stages of production, "processing and preparation" must take place in the specified area, and there must be a "close objective link" between distinctive

⁴¹⁵ Op. cit. footnote no. 384, at page 535.

⁴¹⁶ Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, Official Journal L 208, 24/07/1992 p. 1, as amended.

⁴¹⁷ Ibid.

⁴¹⁸ Council Regulation (EEC) No 2082/92 of 14 July 1992 on certificates of specific character for agricultural products and foodstuffs, Official Journal L 208, 24/07/1992 p. 9, as amended.

⁴¹⁹ European Commission Directorate - General for Agriculture Food Quality Policy in the European Union, Protection of Geographical Indications, Designations of Origin and Certificates of specific character for agricultural Products and foodstuffs, Working document of the Commission services, guide to Community Regulations 2nd edition, August 2004. (http://ec.europa.eu/agriculture/foodqual/quali1_en.htm), at page 4.

⁴²⁰ Ibid. at page 4.

features of the product, and its place of origin, arising from its “geographical environment”, to include “its inherent natural and human factors”.⁴²¹

PGIs in contrast require only one of the production stages to take place in the specified area,⁴²² with the Commission being of the opinion that the “link is of a different nature” for PGIs than for PDOs,⁴²³ with PGIs allowing for a “more flexible objective link”, with it being sufficient to meet the test that the reputation for the agricultural product is “attributable to the geographical origin”.⁴²⁴ It should be noted however that generic names cannot be protected under either the PDO or the PGI registration.⁴²⁵ In contrast Regulation (EEC) No. 2082/92 protects traditional recipes.⁴²⁶ The product, in order to be registered as a TSG, must have a “specific character” either, for example, through its taste or its raw materials, or its traditional mode of production or processing.⁴²⁷ A TSG must “possess features that distinguish it from other products” and it must be a traditional product.⁴²⁸ Its name must not contain any protected geographical indications or designations of origin.⁴²⁹ The protection of a TSG is rather for “other specific features or character”.⁴³⁰ Once registered, a TSG product can be branded as a “traditional speciality guaranteed”,⁴³¹ and use the relevant Community symbol. The TSG is intended for products for human consumption, and does not include tobacco products.⁴³² Processed products, outwith the subject matter of this thesis are also covered, such as chocolate and cacao derived products, and other processed foods such as pre-cooked meals, sauces and ice cream.⁴³³ Natural mineral waters were removed from the ambit of Regulation 2081/92 by Council Regulation (EEC) No.

⁴²¹ Article 21.2(a), second indent, Council Regulation (EEC) No. 2081/92.

⁴²² *Op. cit.* footnote no. 419, at page 7.

⁴²³ *Ibid.* at page 7.

⁴²⁴ Article 2.2(b), second indent, Council Regulation (EEC) No. 2081/92.

⁴²⁵ Article 3, Council Regulation (EEC) No. 2081/92.

⁴²⁶ Article 4, Council Regulation (EEC) No. 2082/92.

⁴²⁷ *Op. cit.* footnote no. 419, at page 7.

⁴²⁸ Article 4, Council Regulation (EEC) No. 2082/92.

⁴²⁹ Article 5.4 Council Regulation (EEC) No. 2082/92.

⁴³⁰ *Op. cit.* footnote no. 419, at page 8.

⁴³¹ *Ibid.* at page 23.

⁴³² *Ibid.* at page 8.

⁴³³ Annex to Council Regulation (EEC) No. 2082/92.

692/2003, as they were more effectively covered by their own pre-existing legislative provisions.⁴³⁴ Council Regulation (EEC) No. 692/2003 did however extend Regulation (EEC) No. 2081/92 to cover wine vinegar, which is not covered under the geographical indications provisions for wines and spirits.⁴³⁵ This system of registration of, in particular, geographical indications led to a referral to the WTO dispute settlement system by both the United States and Australia. A panel was set up⁴³⁶ which recently ruled on the WTO compliance of these regimes, pursuant to two separate DSU complaints by the United States and Australia.⁴³⁷

9.3.1 The WTO panel ruling on the EC's Geographical Origin designation

The United States, in its pleadings,⁴³⁸ had pleaded in a number of alternatives. The panel rejected the US claim that the EC had failed to implement its obligations under Article 2.2 of the TRIPs Agreement,⁴³⁹ or that the regulation was inconsistent with Article 1.1 of the TRIPs Agreement.⁴⁴⁰ In addition the panel rejected the US claim that the execution of the regulation by the authorities of EC member states was in breach of Article 4 of the TRIPs Agreement,⁴⁴¹ or that it breached Article III:4 of GATT 1994,⁴⁴² or that the regulation was in breach of Article 2(2) of the Paris Convention 1967, as incorporated by Article 2.1 of the TRIPs Agreement with domicile or establishment requirements.⁴⁴³ With regard to the objection to the granting of a geographical indication to another party, the

⁴³⁴ Council Directive 80/777/EC of 15 July 1980 on the approximation of the laws of the Member States relating to the exploitation and marketing of natural mineral waters, Official Journal L 229, 30/08/1980 p. 1.

⁴³⁵ Op. cit. footnote no. 419 at page 9.

⁴³⁶ *European Communities – Protection of trademarks and geographical indications for agricultural products and foodstuffs*, WT/DS/174 & WT/DS/290, 15th March 2005.

⁴³⁷ Ibid.

⁴³⁸ DS 174.

⁴³⁹ At point 8.1(m) of the ruling in DS 174.

⁴⁴⁰ At 8.1(n) of the Ruling in DS 174.

⁴⁴¹ At point 8.1(l) of the ruling in DS 174.

⁴⁴² At 8.1 (i) of the ruling in DS 174.

⁴⁴³ At 8.1(g) of the ruling in DS 174.

panel confirmed that the regulation was not inconsistent with either Articles 3.1 TRIPs,⁴⁴⁴ Article 2.1 of the Paris Convention, as incorporated by Article 2.1 of the TRIPs Agreement,⁴⁴⁵ or Article 4 of TRIPs.⁴⁴⁶

The US was however successful in its claim that the regulation was inconsistent with Article 16.1 TRIPs⁴⁴⁷ with regard to the co-existence with trade marks, but that this was “justified by Article 17⁴⁴⁸ of the TRIPs agreement”,⁴⁴⁹ with the panel exercising “judicial economy” with regard to a number of other complaints.⁴⁵⁰ The panel ruled against the EC on the basis of “equivalence and reciprocity conditions” for the granting of protection of geographical indications, pursuant to Article 3.1 TRIPs⁴⁵¹ and Article III:4 GATT 1994,⁴⁵² (both of which deal with national treatment), with regard to the requirement of the transmission and validation of documents by third country governments of applications and objections and participation in inspection structures. The panel therefore ruled that there had been nullification or impairment of benefit accruing to the United States under these agreements, pursuant to Article 3.8 DSU,⁴⁵³ which provides that “where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment”. The panel therefore recommended that the EU bring EC’s Council Regulation 2081/92 “into conformity with the TRIPs Agreement and GATT 1994”.⁴⁵⁴ The ruling in the Australian case,⁴⁵⁵ while reflecting the different approach to pleading the case essentially ruled in a like manner to the USA case.

⁴⁴⁴ At 8.1 (e) of the ruling in DS 174.

⁴⁴⁵ At 8.1(f) of the ruling in DS 174.

⁴⁴⁶ At 8.1(k) of the ruling in DS 174.

⁴⁴⁷ Which grants protection to the owner of a registered trademark.

⁴⁴⁸ Which provides an exception of Article 16 TRIPs, “provided that such exceptions take account of the legitimate interests of the owner of the trademark and third parties.”

⁴⁴⁹ At 8.1(j) of the ruling in DS 174.

⁴⁵⁰ With regard to the United States’ claims under (a) Article 2(1) of the Paris convention (1967), as incorporated by article 2.1 of the TRIPs agreement (except as noted at paragraph 8.1(f), Article 4 of the TRIPs agreement, except as noted at paragraph 8.(k) and (l), and Articles 41.1, 41.2, 41.4, 42, 44.1 and 65.1 of the TRIPs Agreement and Article I:1 of GATT 1994.

⁴⁵¹ At 8.1(d) of the ruling in DS 174.

⁴⁵² At 8.1(h) of the ruling in DS 174.

⁴⁵³ At point 8.3 of the ruling in DS 174.

⁴⁵⁴ At point 8.4 of the ruling in DS 174.

⁴⁵⁵ DS 290.

The Dispute Settlement Panel adopted both of these panel reports, DS174 and DS290 on the 20th April 2005. The EC has since changed its policy and process in this area. Clearly the WTO system approves generally of the nature and tone of the EC's system of registration of geographical indications, a matter which should support the EC's bid to establish a similar system at a multilateral level during the current round of negotiations; however, the unduly bureaucratic approach of the EC regulation to the interaction of third country applicants for EC geographical indication registration, or otherwise third country interested party interaction with the system requires, from a WTO perspective, some redrafting.

10. Services and Agriculture

The last of the three pillars of Annex I to the WTO Agreement, the General Agreement on Trade in Services also merits some examination. At first appearance the connection between the trade in agricultural goods and services may appear to be tenuous. This perception was disproved by the ruling of the Appellate Body in *EC-Bananas*,⁴⁵⁶ of which more later. GATS comprises the framework agreement, eight annexes, and "schedules of specific commitments" of individual member states, specifying the sectors in which the member states are prepared to make concessions.⁴⁵⁷ The services covered are "services in all sectors"⁴⁵⁸ except those "supplied in the exercise of governmental authority".⁴⁵⁹ Services are divided into four methods of supply or "modes". These are cross border supply, consumption abroad, commercial presence and the movement of persons. GATS therefore deals not just with the actual supply of a service but also "establishment in view of the supply of services".⁴⁶⁰ The issue of the free

⁴⁵⁶ Op. cit. footnote no. 49.

⁴⁵⁷ Sauvé, Pierre; Trade Rules Behind Borders: Essays on Services, Investment and the New Trade agenda, Cameron May 2003, at page 22.

⁴⁵⁸ Bourgeois J.H.; The EC in the WTO and Advisory Opinion 1/94: An Echternach Procession, CMLRev. 32(3): 763-787, 1995, at page 765.

⁴⁵⁹ Article I.3 GATS.

⁴⁶⁰ Op. cit. footnote no. 458, at page 765.

movement of persons has “much in common with regular migration”.⁴⁶¹ In such a context it is possible to understand “the potential complexity of developing disciplines” under GATS.⁴⁶²

As a consequence of the political sensitivity of GATS the effect of this document is somewhat different from either GATT or the Agreement on Agriculture. The general WTO concepts of Most Favoured Nation⁴⁶³ and National Treatment⁴⁶⁴ appear in the GATS, however they operate differently here than in other agreements. Market access under GATS, in contrast to GATT and its associated agreements, is only required “to the extent of” member states’ “specific commitments in their schedules”⁴⁶⁵ under Article XVI GATS.⁴⁶⁶ Not only are exceptions to the MFN rule provided for, but NT “can also be subject to qualifications”.⁴⁶⁷ Not only could members specify their exceptions at the time of the signing of GATS, but so too can member states “shape their commitments *ex ante* and [be enabled] to modify their commitments *ex post*.”⁴⁶⁸ A truly remarkable level of discretion for a WTO agreement! The drafting of the GATS has also a “hybrid nature”, with some of its provisions applying to “any measure by a member that affects trade in services”, and others dealing with specific commitments only.⁴⁶⁹ The MFN rule is cross sectoral, while market access and national treatment disciplines only apply to the specific commitments of WTO member states under the GATS.⁴⁷⁰

⁴⁶¹ Chaudhuri, Sumanta, Mattoo, Aadity & Self, Richard; Moving People to Deliver Services: How can the WTO help? *Journal of World Trade* 38(3): 363-393, 2004-10-31, at page 366.

⁴⁶² Op. cit footnote no.457, at page 101.

⁴⁶³ Article II GATS.

⁴⁶⁴ Article XVII GATS.

⁴⁶⁵ Schedules of Member States were negotiated pursuant to Article XX, and can be modified pursuant to Article XXI GATS.

⁴⁶⁶ Lee, Yong-Shik: Emergency Safeguard Measures under Article X in GATS; Applicability of the concepts in the WTO Agreement on Safeguards. *J.W.T.* 33(4): 47-59, 1999, at page 48.

⁴⁶⁷ Ibid. at page 48.

⁴⁶⁸ Ibid. at page 49.

⁴⁶⁹ Leroux, Eric H.: Trade in Financial Services under the World Trade Organization; *JWT* 36(3); 413-442, 2002, at page 415.

⁴⁷⁰ Ibid. at page 415, et seq.

While GATS does deal with other provisions,⁴⁷¹ covering an ambitious agenda, the actual effect of this particular document is limited, recognising that the development of the law in this area “will be a progressive one”,⁴⁷² with GATS being added to in future negotiations. The negotiating in this sector under the Uruguay Round was quite conservative, with cross-linkages, not only between GATS and other WTO agreements not having been made in the trade offs, but also not having been made between different GATS provisions.⁴⁷³ This caution was also reflected in the fact that most countries bound their GATS obligations at a higher level than they actually operate in practice.⁴⁷⁴ The underlying “considerable sectoral diversity” in regulation of the various areas that GATS attempts to address has resulted in “policy tensions” in the drafting of GATS, requiring “flexible (and dual) rule-making responses”.⁴⁷⁵ Disciplines have yet to be developed in various service sectors, pursuant to Article VI:4 with the accountancy sector being the only one so covered to date.⁴⁷⁶ Until such disciplines are developed a WTO member state cannot provide “licensing and qualification requirements and technical standards” which would operate in order to “nullify and impair” specific commitments made pursuant to “Article VI:4 (a) to (c) and (2)”.⁴⁷⁷ Negotiations under the GATS Agreement re-opened in February 2000, with a mandate progressively to liberalise international trade in services.⁴⁷⁸

⁴⁷¹ Such as transparency, economic integration, recognition of education standards, domestic regulation, public monopolies, government procurement, emergency safeguards, and freedom of movement of payments, subsidies for services, with provisions for exemptions for “health, safety, consumer protection or national security”, *Op. cit.* footnote no. 459, at page 26.

⁴⁷² Hyettl, Stephen; *The Uruguay Round and GATT: The United Kingdom Standpoint*, Ch 7 in Emiliou and O’Keeffe, *the European Union and World Trade Law after the GATT Uruguay Round*, John Wiley and Sons, 1996, at page 92.

⁴⁷³ Bronckers Marco C.E.J. and Larouche, Pierre; *Telecommunications Services and the World Trade Organisation*, J.W.T. 1997 31(3) 5-48, at page 6.

⁴⁷⁴ Mukherjee, Neela; *Exporting Labour Services and Market Access Commitments under GATS in the World Trade Organization; An analysis from the Perspective of Developing Countries*, J.W.T. 1996 30(5), 21-42, at page 39.

⁴⁷⁵ *Op. cit.* footnote no. 457, at page 115.

⁴⁷⁶ *Op. cit.* footnote no. 469, at page 419.

⁴⁷⁷ *Ibid.* at page 419.

⁴⁷⁸ *Op. cit.* footnote no. 457, at page 73.

The EC's interaction with GATS was addressed in *Opinion 1/94*,⁴⁷⁹ where a distinction was made between the four modes of supply. Mode one, cross border supply, was found to be squarely within the competence of the EC, and the then version of what is currently Article 133 EC,⁴⁸⁰ as it was "not unlike trade in goods".⁴⁸¹ The other three modes of supply⁴⁸² were found to be in a different position, and were not covered by the CCP as it then was, with the final ruling of the ECJ being that competence in GATS matters was shared between the EC and its member states. It should perhaps be noted that the Commission, "being the negotiator for the Community and the Member States" attached a schedule of commitments to GATS on behalf of all of the EU members at the time.⁴⁸³

The amendment of the CCP provision by the Nice Treaty to allow for GATS negotiations by the EC, with, as with TRIPs negotiations, unanimity being required in the Council for the conclusion of agreements in this field.⁴⁸⁴ For its part, the EU Constitution, (which is currently in troubled legal waters) in Article III-315 replicates the unanimity provisions of the post-Nice Article 133 with respect to the conclusion of international agreements in the area of services. Article III-315.6 provides that "the exercise of competences conferred by this Article... shall not affect the delimitation of internal competences" within the Union. It is to be expected that as the GATS develops, as it is expected to do, further tensions and strains on the division of competences in GATS issues within what is currently the EC will become evident. In particular, the issue of the establishment of a service provider under EC law, provided by *R v. Secretary of State for Transport ex. parte Factortame Ltd. and others (No. 3)*⁴⁸⁵ as a "matter of general principle" of the EEC treaty, as it then was, "should be interpreted in a

⁴⁷⁹ Op. cit. footnote no. 372.

⁴⁸⁰ Formerly, and at that time known as Article 113 EC.

⁴⁸¹ At paragraph 44 of the opinion, in *Opinion 1/94*.

⁴⁸² Being consumption abroad, commercial presence and the movement of persons.

⁴⁸³ Op. cit. footnote no. 472, at page 92.

⁴⁸⁴ Article 133.5 EC, post Nice.

⁴⁸⁵ Case C-221/89; *R. v. Secretary of State for Transport ex. parte Factortame Ltd. and others (No. 3)*, [1992] QB 680, [1992] 3 WLR 288.

manner consistent with international law”,⁴⁸⁶ but that “to require member states to depart from the universally recognised criterion of the owner’s nationality would place Community law in conflict with international law, which should be avoided”. The relevant international law concerned the flag of a particular vessel. Whether this case could be distinguished, or whether it could also apply to future developments of GATS law as it affects EC law, and the law of EC member states, has yet to be established.

The ruling of the Appellate Body in *EC-Bananas*⁴⁸⁷ brought together the strands of trade in agricultural goods and services in a very concrete way. The panel at the earlier hearing had found that there was no legal basis for “an *a priori* exclusion” of GATS from a case concerning the import licensing regime of bananas into the EC.⁴⁸⁸ The Appellate Body for its part held that GATS has a “broad reach”⁴⁸⁹ and upheld the findings of the earlier panel ruling on this matter. They went on to state that while “GATS was not intended to deal with the same subject matter as the GATT 1994,”⁴⁹⁰ they were not always mutually exclusive. There was “a third category of measures” that could fall under both GATT and GATS, which were “measures that involve a service relating to a particular good, or a service supplied in conjunction with a particular good.”⁴⁹¹ In such circumstances the “measure in question could be “scrutinized under both the GATT 1994 and the GATS”,⁴⁹² with a different focus for scrutiny under the different agreements. The Appellate Body then went on to state that the “EC banana import licensing procedures” were “subject to both the GATT 1994 and the GATS”, with these two agreements overlapping in this situation, with regard to the particular facts in question.⁴⁹³

⁴⁸⁶ At paragraph 39 of the judgment.

⁴⁸⁷ Op. cit. footnote no. 49.

⁴⁸⁸ At paragraph 7.286 of the ruling.

⁴⁸⁹ At paragraph 220 of the ruling of the Appellate Body.

⁴⁹⁰ At paragraph 221 of the ruling.

⁴⁹¹ Ibid. at paragraph 221 of the ruling.

⁴⁹² Ibid. at paragraph 221 of the ruling.

⁴⁹³ At paragraph 222 of the ruling.

11. TRIPs and GATS development in the area of agriculture

As with the post-Nice version of Article 133 EC the proposed EU Constitution at Article III-315 provides that the “Council shall act unanimously when negotiating and concluding an agreement” dealing with trade in services and commercial aspects of intellectual property. As discussed earlier, little change therefore can be anticipated in a post EU Constitutional framework on the legal relationship between the EC and the WTO in the field of either GATS or TRIPs relevant matters. How a proposed new TRIPs or GATS agreement, or changes thereto, might develop as a result of the current round of negotiations has still however to be established. While there is little indication as yet as to how GATS might develop further so as to intersect with agricultural issues, the possible development of TRIPs issues as they affect agriculture can however be forecasted. The issue of the interaction of TRIPs and the Annex IA agreements still needs to be addressed. The current academic view, held, *inter alia* by Bronckers is that “TRIPs is a *lex specialis*” having precedence over the Annex IA agreements,⁴⁹⁴ in light of TRIPs balancing of “trade liberalisation” principles with the need for “increased intellectual protection”, in contrast to GATT’s exclusive focus on trade liberalisation.⁴⁹⁵ This view needs somehow to be reconciled with the apparently opposing view that there might be an interaction between the two annexes in the field of exhaustion of rights.⁴⁹⁶ The future development of TRIPs with regard to the existing tension, both in the EC and in the US, between the use of plant patents and plant variety rights will also merit following. Also requiring a solution is the issue of the interaction of the UN Convention on Biological Diversity with TRIPs, particularly in the area of “biopiracy” and “*ordre public* or morality”⁴⁹⁷ which are currently under review in the current WTO negotiations. Geographical indications (GIs), as operated, *inter alia*, by the EC are also up for

⁴⁹⁴ Op. cit. footnote no. 369, at page 143.

⁴⁹⁵ Ibid. at page 144.

⁴⁹⁶ Ibid. at page 144 et seq.

⁴⁹⁷ Op. cit. footnote no. 404, at page 204.

review, with the European Commission holding the view that “geographical indications are an important matter for the European Communities”,⁴⁹⁸ given the need to refocus on the production of quality agricultural products, rather than quantity, in light of the mid-term review of CAP. The Commission states that the EC’s three main objectives in this area for the current round of WTO negotiations are; first, the development of a “multilateral register of geographical indications”, second, the extension of geographical indication protection from not just wines and spirits, but also to encompass cheeses, teas and rice, to the extent that non-traditional producers cannot produce these products with “made in the USA” or “in the style of...”, both issues for the TRIPs negotiating committee, and third, “ensuring market access for EU GI products”, a matter for the Committee on Agriculture negotiations.⁴⁹⁹ The EC’s current system of registration of geographical indications and designations of origin, as operated under EC Council Regulation 2081/92⁵⁰⁰ was itself brought into question at the WTO, being the subject of two recently adopted WTO panel rulings.⁵⁰¹

⁴⁹⁸ Intellectual property; Why do geographical Indications matter to us? Brussels, 30 July 2003 <http://europa.eu.int> – European Commission – Trade.

(http://ec.europa.eu/trade/issues/sectoral/intell_property/argu_en.htm)

⁴⁹⁹ Ibid.

⁵⁰⁰ OJ L 208.

⁵⁰¹ Op. cit. footnote no. 436.

12. Conclusion

The complexity of the restructuring of the CAP to meet existing WTO commitments taking into account the EC's existing rural policy, and vision of the impact of environmental law considerations, (to include a possible Integrated Product Policy in EC agricultural law) is adding complexity to an already difficult legal interaction between two evolving legal regimes, with differing approaches to law in their constitutional and operational framework. In addition the differing approaches to health and consumer issues, highly relevant in the context of agriculture and food, at the two levels of governance, must also be added to the mix. While the EC might be manoeuvring its CAP in order to be WTO compliant, new WTO issues may well emerge from the EC's revised policy position on agriculture. Further complexity is added by the highly relevant, but perhaps non-core issues of the impact, or otherwise, of competition policy, intellectual property and services law on this dynamic. No conclusions can be brought to bear at this stage of the development of the legal relationship between the EC and the WTO, except that further disputes will undoubtedly reach the WTO dispute resolution system in these areas in the future, in the absence of an adequate response to the issues highlighted in the course of the current round of WTO negotiations. Added complications will arise in the future from the continuing evolution of both the EC and the WTO.

A speculative point could perhaps be made at this stage on the possible future development of EC agriculture, and its potential impact with GATS. As lawyers who follow environmental developments would be aware, the EC, pursuant to the Kyoto Protocol on Climate Change, has developed an emissions trading scheme (EU ETS), pursuant to Directive 2003/87/EC,⁵⁰² which commenced operation in January 2005. The philosophy behind this scheme was the attainment of emission

⁵⁰² Directive 2003/87/EC of the European Parliament and the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community amending Council Directive 96/61/EC, OJ L 275/32.

control objectives utilising an economic model and rationale, and avoiding previous command and control models of regulation, which had proven to be economically inefficient in the arena of agriculture. While the mid-term reform of the CAP is less explicit as to the rationale a similar trend can be seen behind the move from the price support mechanism of the unreformed CAP, and the methodology inherent in the mid-term review.

As discussed earlier in this chapter, the multifunctionality debate within the CAP, which is very explicit, has been discussing the provision of the agricultural community of “services” which are “mainly of a public good character”,⁵⁰³ with the detail of these “services” to be written into the national or sub-national plans for the GAEC tests provided for in Article 5 of Council Regulation (EC) no. 1782/2003. It is to be anticipated that some of the lessons learned in the Environmental directorate of the Commission will inform the agricultural directorate and the national and sub-national levels of governance over time. It is possible that the thinking behind the currently existing EU ETS will inform a possible future trading scheme for “agricultural environmental services” of a “public good character”. Should such thinking develop, then undoubtedly the GATS agreement, or its successor, will develop a more active dynamic with the WTO Agreement on Agriculture, or its successor, given the intention for these service provisions to be “remunerated by appropriate agri-environmental measures”,⁵⁰⁴ as discussed earlier in this chapter, and in chapter 2. Such a development would further bring agriculture into the still developing field of competence of the GATS Agreement, given the “broad reach” which this Agreement was held to have had in the Appellate Body in the *EC-Bananas*⁵⁰⁵ ruling. This could happen either as an exclusive GATS activity, or a GATT/GATS activity,⁵⁰⁶ involving “measures that involve a service relating to a

⁵⁰³ Op. cit. footnote no. 164, at page 1.

⁵⁰⁴ Op. cit. footnote no. 170, at page 46.

⁵⁰⁵ Op. cit. footnote no. 49.

⁵⁰⁶ At paragraph 221 of the ruling.

particular good, or a service supplied in conjunction with a particular good.”⁵⁰⁷ Whether a development could lead to environmental services being provided by less developed non-polluting countries to more-polluting countries through a global market place, is something which perhaps could be examined in future global agri-environmental negotiations.

It is clear that the subject matter of this thesis is very much in flux, with the two legal jurisdictions being examined, the EC and the WTO, both being subject to major reform developments at the moment. It is unclear whether the new European Constitution will be ratified in its current format by all of the current 25 member states of the WTO, and as a consequence, whether it is the EC, with its current dealing of agriculture as predominantly a matter of exclusive sovereignty of the EC, where the EC has set up a common organisation of a particular agricultural commodity, or the proposed new EU Constitution classification of agriculture as being a matter of shared competence between the new EU and its member states, that will be the foundation of the future development of the CAP. For its part the WTO agreements are currently under negotiation under the Millennium Round of negotiations, with little development to date having been achieved in the agricultural negotiations.

Should the jurisdictional issues remain unchanged at either the EC or the WTO level, changes will nevertheless follow in the agricultural area, with the mid-term review of the CAP now in operation, with national and sub-national regions still to fill in the details under the now devolved powers under the reformed CAP. This will in due course be complemented, in the short to medium term, by the reform of Pillar II of the CAP. The integrated product policy of the EC is anticipated to pose problems for the EC-WTO legal nexus, as will the outstanding unreformed elements of the CAP. At the WTO level, the full impact of the expiration of the peace clause has still to be felt, with its consequent

⁵⁰⁷ Paragraph 221.

changed dynamic between the various WTO Annex IA agreements as they affect agriculture.

While the possible future impact on the legal nexus of the EC and the WTO in the area of agriculture of the GATS can only be guessed at, the impact of the TRIPs Agreement is already clear, as indicated by the recent WTO panel rulings on GI's, however the tensions between plant varieties and plant patents still requiring to be resolved. The differing interaction of both legal jurisdictions with international law, particularly environmental law, will also pose problems in the future. It is to be hoped that the foregoing analysis will assist the reader in better understanding the reflexive relationship between these two levels of governance, and their turbulent dynamic in the area of agriculture. Such is the state of the law, and of the underlying policy in this area, that it is not however possible to provide the reader with a definitive prognosis as to the problems that arise in this area. A caveat must also be placed on the foregoing analysis. For the purposes of addressing a particular issue within a specific word count, and within a defined period of time, a focusing in on particular issues is required. A further analysis of the legal interaction between the EC and the WTO in the area of agriculture will be made in chapter 9.

- 1. Introduction**
- 2. Conceptualising globalisation and regionalisation**
- 3. Issues with the current regulatory framework**
- 4. The land – economics nexus**
- 5. Issues for the future**

1. Introduction

As stated at the outset of this thesis, the focus of this work has been the legal relationship between the EC and the WTO in the area of agriculture. While both legal jurisdictions have clearly documented provisions dealing with agriculture, these specific provisions are not the only provisions which impact on the legal nexus between these two levels of governance dealing with agriculture. Just as the specific provisions dealing with agriculture at both levels of governance interact with allied provisions in other documents or policy provisions in order to complete the picture of regulation in the area of agriculture in their own jurisdictions, so too do these levels of governance not only interact with each other, but also with legal provisions and policies outwith their jurisdictions. These complex relationships of law and policy, with “support for agriculture is primarily strategic in nature” across countries,¹ are further complicated by the fact that both jurisdictions, independent of their agricultural provisions, are in the process of self transformation, upon which potential changes at the WTO level in the area of agriculture, and ongoing radical changes with the EC in this area must also be added to the mix. The entirety of the reflexive relationships required to be examined in order to obtain a detailed picture of the state of agricultural law at this legal nexus cannot however be encompassed in one PhD thesis. Limitations of time and word count have necessitated a selection of certain issues, and a

¹ Delcros, Fabian; the Legal Status of agriculture in the World Trade Organization; State of Play at the Start of Negotiations, J.W.T. 36(2): 219-253, 2002, at page 219.

deselection of others for discussion. Matters which have been omitted by this thesis by virtue of the need to focus on key areas include the entirety of the issues concerning developing and least developed countries, which are having an increasing influence on the subject matter of this thesis, at the UN, WTO and EC levels (through the EC's GSP, the Euro-Med agreements and the Cotonou agreement). In addition practically the entire operation of the UN's Food and Agriculture Organisation has been omitted from this thesis, despite its undisputed impact on global trade in agricultural commodities. Issues directly concerning the WTO and the EC, to include legitimacy and democracy issues, of relevance to the issue of governance at these levels, issues which result in the use of much press ink have also been omitted from this thesis, in order to focus in depth on the issues at or closest to the legal nexus between the EC and the WTO in the area of agriculture, the chosen focus point of this thesis.

2. Conceptualising globalisation and regionalisation

As referred to above,² neither the EC nor the WTO occupy static points in legal theory, but rather are both in the process of development into a new, yet to be defined, grundnorm of the post-globalisation and regionalisation legal and regulatory age. Whether the WTO will move from the "trade policy" to the more "integration" model as used by the EC, as observed by the OECD,³ has yet to be established, given the weakness in the current WTO framework of the "mercantilist" approach to negotiation.⁴ This "mercantilist" approach does not accommodate the more complex ideas of either international economic or governance models, which include concepts very much to the fore in agricultural discourse, such as sustainability and multifunctionality. In addition, the absence of reference to human rights in any of the WTO agreements is an inherent flaw in

² And as discussed more fully in chapter 7.

³ Discussed in chapter 1.

⁴ Jackson, John H.; Sovereignty, subsidiarity, and separation of powers: the high-wire balancing act of globalisation, Ch 1. in Kennedy and Southwick: *The Political Economy of International Trade law*, essays in Honour of Robert E. Hudec, Cambridge University Press, 2002, at page 30.

the system.⁵ While both Article XXIV GATT 47 and Article 20 of the Agreement on Agriculture both refer to “non-trade” concerns, the ability of the WTO membership and institutional framework to develop these provisions to meet the increasingly complex needs of the global community will continue to be challenged. This weakness in the inability of the WTO to “consider, balance and co-ordinate the various public goods and private interests implicated” in the broad programme for development set out in the WTO documents,⁶ together with the current emphasis in the documentation on enhancing “global corporate expansion”, with no provision for the curbing of “certain harmful forms of corporate development, no matter what problems they bring”,⁷ remains a problem in need of a “proto-constitution”⁸ solution, such a proto-constitution as forms the backbone of the EC regulatory regime.

The development at the WTO level of either such a “proto-constitution” or even greater capacity to deal with the “non-trade” concerns of the GATT and the Agreement on Agriculture, appears to be currently unlikely. This view is arrived at as the recent report from the WTO’s Consultative Board recommends⁹ that the WTO should remain a forum exclusively for trade negotiations,¹⁰ with only co-operation with “other intergovernmental agencies”¹¹ being recommended, in recognition of the increasing complexity of issues being addressed by the WTO panels and the Appellate Body. Problems will continue to manifest themselves at

⁵ As critiqued by Petersman, and discussed in chapter 1. Petersmann, Ernst-Ulrich; *Constitutionalism and WTO law: From a state-centred approach towards a human rights approach in international economic law*, Ch 2. in Kennedy and Southwick: *The Political Economy of International Trade law*, essays in Honour of Robert E. Hudec, Cambridge University Press, 2002, at page 32.

⁶ Walker, Neil, *Late Sovereignty in the European Union*, Ch. 1 in Walker, Neil (ed.) *Sovereignty in Transition*, Oxford – Portland Oregon 2003, at page 32.

⁷ Mortensen, Jens Ladefoged; *The Institutional Requirements of the WTO in an Era of Globalisation: Imperfections in the Global Economic Polity*, E.L.J. 2000, 6(2), 176-204, at page 177.

⁸ *Ibid.* at page 203.

⁹ Discussed in chapter 8.

¹⁰ At point 7 of the report.

¹¹ At point 6 of the report.

the WTO given the fact¹² that the WTO has been constituted and resourced to govern only "one aspect of globalisation in actuality".¹³

In addition the role of law at the two levels of governance differs. The WTO¹⁴ can be classified as a weak enforcer, a weak monitor, and a weak legitimiser,¹⁵ with law gradually emerged from the "negotiating atmosphere of multilateral diplomacy" which marked the origins of GATT 1947. The future development of law at the WTO may however be affected by the very large number of members at the WTO, and their differing approach to law within their domestic jurisdictions.¹⁶ In contrast, the role of law at the EC would appear to be unquestionable, with the EC having been set up, and being run on the basis of the rule of law. This is reinforced by the EC emergence as a "constitutional regime".¹⁷ This view however can be questioned when it comes to the subject matter of this thesis, the analysis of the legal relationship between the EC and the WTO,¹⁸ with a continued aversion of the ECJ to the granting of direct effect to the provisions of the WTO agreements within the EC jurisdiction, as evidenced in *Portugal v. Council*.¹⁹ Added to this is the operation of the EC's TBR²⁰ where political issues, such as the Community interest, comes into play in deciding on whether to proceed with a TBR action, what is otherwise a legal mechanism.

¹² As discussed in chapter 5.

¹³ Op. cit. footnote no. 7, at page 177.

¹⁴ Discussed in chapter 4.

¹⁵ Op. cit. footnote no. 7, at page 186.

¹⁶ Watts, Sir Arthur KCMG QC, Burden of Proof, and Evidence before the ICJ, Ch. 15 in Weiss, Freidl (ed.), Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals, Cameron May 2000, at page 289.

¹⁷ Marks, Gary, Hooghe, Liesbeth, Blank, Kermit, European Integration from the 1980s: State-Centric v. Multi-level Governance, J.Com.Mar.St.1996, 34(1), 341-378, at page 369.

¹⁸ As discussed in chapter 6.

¹⁹ Case C-149/96: *Portuguese Republic v Council of the European Union*, [1999] ECR at I-08395.

²⁰ Analysed in chapter 6.

3. Issues with the current regulatory framework

Both the global regulatory framework for agriculture and that of the EC have undergone many changes over the years, with, since the accession of the EC to the WTO, with the mid-term review with its “largely decoupled single payment scheme” being “widely seen” as being “a response to the pressures brought upon farm policy-makers by the international trade negotiations”.²¹ The “process of agricultural policy reform” within the two levels of governance have been classified by Coleman and Tangerman as “autonomous, linked games”,²² which describes a state of “reaching and equilibrium” at one level results in “new assessments of pay-offs for policy reform in the other”.²³ In addition to the continuing issue of “how quickly, and how completely” WTO members, the EC included, is “willing to change its agricultural policies” once a ruling has been made against them at the WTO,²⁴ the changes are not, however, complete. For example, as pointed out by Josling and Raw, the “average agricultural tariff” is “probably about 40 percent” in contrast to the industrial tariffs, which are usually “closer to 5 percent” with “some manufactured goods... now traded duty free”.²⁵ As stated by Delcros, “it is now up to the negotiators,” of the current round of negotiations, to “decide whether and to what extent agriculture” should continue to benefit from exceptions from the regulations for non-agricultural commodities at the WTO.²⁶

²¹ Swinbank, Alan; Developments in the Doha Round and WTO dispute settlement: some implications for EU agricultural policy, (2005) 32 *European review of Agricultural Economics* 551, at page 552.

²² Coleman, William D. and Tangermann, Stefan; The 1992 CAP Reform, the Uruguay Round and the commission: Conceptualizing Linked Policy Games, *Journal of Common Market Studies*, Vol. 37, No. 3 pp. 385-405, Page 387.

²³ Ibid. at page 388.

²⁴ Op. cit. footnote no. 21 at page 557 et seq.

²⁵ Josling, Tim and Raw, Allan; Options for enhancing market access in the new round, Chapter 9 in Ingco Merlinda D. and Winders L. Alan; *Agriculture and the New Trade Agenda Creating a Global Trading Environment for Development*, Cambridge University Press, Cambridge, 2004, at page 176.

²⁶ Op. cit. footnote no. 1 at page 253.

At the EC level the shift in emphasis from Pillar I to Pillar II of CAP²⁷ is only now beginning to be seriously undertaken with the recent mid-term review. Despite this the CAP still suffers tensions emanating from the original “multifunctional” drafting of its treaty provisions, with such a multifunctional approach being championed by the European Commission’s agricultural directorate. While the CAP has been reformed to meet the needs of free trade in agricultural commodities, the underpinning philosophy of the WTO’s Agreement in Agriculture, in which “import levies have disappeared, being replaced by customs duties”,²⁸ the CAP still utilises, in contradiction to the concept of free trade in agricultural commodities, a simplified structure of import and export licences, export refunds, import duties and tariff quotas, together with emergency safeguard measures.

For its part the WTO regulatory regime is also incomplete, despite the fact that the “inclusion of agriculture in the rules of the WTO is one of the main achievements of the Uruguay Round Agreement.”²⁹ Its “substantial waivers”³⁰ however could be subject to further disciplines being anticipated in agriculture emanating from the current WTO round of negotiations. A further integration of internal WTO regulatory provisions is anticipated with the recent expiration of the Agreement on Agriculture’s peace clause,³¹ with the Agreement on Subsidies and Countervailing Measures coming into the agricultural frame.³² A further tightening of legal discipline at the WTO can also be anticipated, not only based on existing documentation, but also for new areas of competence which the WTO, should it wish to complete its global regulatory framework, would need to address. For example, the issue of the regulation of rules of origin³³ still has to be resolved at the WTO level; the Uruguay Round Agreement on Rules of Origin for

²⁷ As discussed in chapter 2.

²⁸ Usher, J.; *EC Agricultural Law*, 2nd edition, Oxford University Press, 2001, at page 81.

²⁹ *Op. cit.* footnote no. 1 at page 253.

³⁰ *Ibid.* at page 253.

³¹ Article 13 Agreement on Agriculture.

³² As discussed in particular in chapter 7.

³³ As discussed in chapter 3.

non-preferential trade, despite providing clarity as to when non-preferential rules of origin are to be applied, still reads as a document reflecting work in progress.

The variety of practices which exists in “rules of origin” to include regional cumulation rules will also, no doubt, become the subject matter of the output of the joint work of the WTO’s Committee on the Rules of Origin,³⁴ and the World Customs Organisation. In addition the WTO has yet to enter the fray in the area of export credit insurance, with the OECD being the international body currently providing the lead in this area, despite the fact that export credit is seen to be³⁵ “of great importance in international trade” for the EC, being “a key instrument of commercial policy”.³⁶ New disciplines on “export credits, export credit guarantees or insurance programmes”³⁷ are anticipated from the WTO, given the agreement amongst WTO member states to “work toward the development of internationally agreed disciplines”.³⁸ All of this, in due course, will have to be added to the WTO agricultural law mix. Another noticeable exception from the rules and disciplines of the WTO is the operation of any type of competition policy in the area of agriculture. The development of such a discipline could cause problems for agricultural regimes, as pointed out by the OECD “competition law protects competition, not competitors”,³⁹ which would adversely impact on the functions of EC’s CAP in the protection of agricultural communities and their regions. While the prognosis for the development of a comprehensive agreement on competition law at the WTO is doubtful, given the lack of competition law regimes within many of the WTO member states domestic jurisdictions, with many others being of “recent vintage”,⁴⁰ the fact⁴¹

³⁴ Operating through the WTO’s Technical Committee on Rules of Origin

³⁵ As discussed in chapter 3.

³⁶ Snyder, Francis; *International trade and Customs Law of the European Union*, Butterworths, 1998, at page 174.

³⁷ *Ibid.* at page 289.

³⁸ *Ibid.* at page 289.

³⁹ OECD, *Trade and Competition: From Doha to Cancún*, OECD 2003, at page 9.

⁴⁰ Nottage, Hunter, “Trade and competition in the WTO”, *Pondering the applicability of special and differential treatment*; JIEL (2003) 23-47, at page 41.

⁴¹ As discussed in chapter 8.

that a WTO working group has been set up⁴² must be taken into consideration when completing the picture for the future development, over the medium to long term, of the legal relationship between the EC and the WTO in the area of agriculture. Development however during the course of the Doha round on this point will not be forthcoming given the abandonment of negotiations on this issue.

A matter which is coming to the fore in agricultural matters in recent years is the contrast in the relationship between the EC and the WTO and external legal standards and organisations. This issue remains problematic for the legal nexus between the EC and the WTO. This problem manifests itself through the EC's granting of "considerable – though contingent – authority" to international standards,⁴³ in particular with regard to TBT matters.⁴⁴ With a similar approach lacking at the WTO level, member states are required to utilise their own standards, as long as they do not operate as restrictions on trade, or as a discriminatory mechanisms.⁴⁵ A potential golden opportunity for the WTO provisions on externally set standards to be aligned with similar EC provisions would appear to have been missed during the development of the WTO. Issues such as the labelling of GM foods fall into this regulatory disjunction, increasing both the current and potential future volume of disputes being brought before the WTO's dispute settlement system as a result.

A similar issue, and one coming to fore given the rewriting of the EC-CAP is the interaction of the EC and WTO trade and agricultural provisions with environmental and social provisions. This interaction is not only present, but also highly active within the EC jurisdiction, given the synergies with EC Environmental law, as evidenced in the need to keep land in "good agricultural

⁴² This working group was established at the Singapore Ministerial Conference in December 1996 (<http://www.wto.org>).

⁴³ Scott, Joanne; *International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO* EJIL 2004, Vol. 15 No. 2, 307-354, at page 330.

⁴⁴ As discussed in chapter 8.

⁴⁵ Covelli, Nick and Hohots, Viktor, *The Health Regulation of Biotech Foods under the WTO Agreements*, JIEL 6(4), 773-795, at page 786 et seq.

and environmental condition" (GAEC), and EC Rural Policy, with the rebalancing of CAP between its two pillars. Such synergies are notably weak or absent at the WTO level. In the absence of internal synergies, it is worth noting that the interaction at the WTO level of the WTO regulatory regime with Multilateral Environmental Agreements is also proving problematic.⁴⁶ This, in the absence of the "proto-constitution" at the WTO, with the "trade policy" approach rather than the "integration" model of development being utilised at the global regulatory level, will result in undue pressure being put on Articles XX of GATT 1947 and Article 20 of the Agreement on Agriculture to paper over the cracks of the "mercantilist" drafting of the WTO documentation. The WTO's Committee on Trade and the Environment has already been caught in these particular headlights, having to reconcile the conflicting values between states on the issue of the environment,⁴⁷ with developing countries requiring focus on the "trade impacts of environmental measures" and not on the "environmental aspects of trade rules".⁴⁸ While this nexus at the WTO remains tense, at the EC level EC Agricultural law, EC Environmental law and EC Rural law appear to be developing synergies as evidenced in the recent and anticipated reforms of the CAP. The consequences of the divergence of approach for the legal nexus between the EC and the WTO in the area of agriculture could be highly problematic.

4. The land – economics nexus

The above tensions at the WTO can be analysed in the context of a disjunction between economics, upon which international trade principles, and those of the WTO are unquestionably based, and land,⁴⁹ with "economics as a

⁴⁶ As discussed, *inter alia*, in chapter 8.

⁴⁷ Shaffer, Gregory C.; "If only we were elephants": The political economy of the WTO's treatment of trade and environment matters. Ch 12. of Kennedy and Southwick: *The Political Economy of International Trade law*, essays in Honour of Robert E. Hudec, Cambridge University Press, 2002, at page 359 et seq.

⁴⁸ Ibid. at page 359.

⁴⁹ As discussed in chapter 1.

discipline float(ing) free from the natural world”⁵⁰ clearly no longer expedient, an issue with which the EC is attempting to grapple. This disjunction between land and economics is proving now, and will continue in the future, to be highly problematic for the development of an agricultural regulatory framework at both the WTO and EC levels. The EC’s original “multifunctional” drafting of the EC Treaty provisions dealing with the CAP,⁵¹ with the continuing advocacy of the EC of a multifunctional approach to agriculture, reflected to a certain extent in the mid-term review provisions, will add to these tensions. In addition the potential for further development in the evolving EC Rural Policy and potentially in the EC’s 6th environmental action programmes’ Integrated Product Policy,⁵² could add to this problem.

5. Issues for the future

Issues which will, as opposed to may, prove problematic in the future include, *inter alia*, the expiration of the additional temporary waiver from the WTO of the provisions of Article I.1 GATT for the Cotonou Agreement,⁵³ due to expire on the 31st December 2007. This Cotonou waiver has already lead to a WTO arbitration ruling.⁵⁴ The EC was required under the additional temporary waiver agreement to substitute a “tariff only regime for exports of bananas” for its WTO non- compliant tariff rate quotas for this commodity by the 1st January 2006, subsequent to the findings in the *EC-Bananas* case⁵⁵ with an opportunity being afforded to the complainants in that dispute to challenge the “methodology used for the rebinding of the EC tariff on bananas” under the Doha Waiver, an opportunity which they took up in this arbitration case. The arbitrator found that

⁵⁰ Daly, Herman E. & Cobb, John B. Jr.; "For the Common Good: redirecting the economy toward community, the environment, and a sustainable future"; Beacon Press, 1994, at page 99.

⁵¹ Referred to in chapter 2.

⁵² Both referred to in chapter 8.

⁵³ *European Communities – The ACP-EC Partnership Agreement*, Decision of 14 November 2001, WT.MIN (01)/15, Ministerial Conference fourth Session Doha, 9-14 November 2001.

⁵⁴ *EC – the ACP-EC Partnership – recourse to arbitration pursuant to the decision of 14 November 2001*, 1 August 2005, WT/LJ/616.

⁵⁵ *European Communities – Regime for the Importation, Sale and Distribution of Bananas, complaints by Ecuador, Guatemala, Honduras, Mexico and the United States* (WT/DS 27).

“it was satisfied that the internal price calculated by the European Communities in order to arrive at its envisaged rebinding does not reflect as accurately as possible the actual prices at which bananas are sold on the EC market.”⁵⁶

In addition the proposed rules of origin reforms for non-preferential rules of origin, the absence of a GATT GSP code,⁵⁷ and the continuing development of the Euro-Med agreements will undoubtedly pose problems for these aspects of the EC's external trade in agriculture. In addition the potential development of GATS and TRIPs in their interaction with agriculture will merit close attention, as will the development of the concept of the “precautionary principle” at the WTO level, of relevance to health and consumer issues.⁵⁸ The concerns of the WTO's Consultative Board,⁵⁹ of the “buying out” of the WTO system by member states, with the “spaghetti bowl” of discriminatory preferences, will also have to be addressed. Whether the strengthening of the governance of the WTO advocated by the Consultative Board will be adequately followed up in the current round of negotiations, and whether that follow up will be sufficient to develop the “proto-constitution” advocated by legal academics in order for the WTO adequately to meet the needs of globalised society has yet to be established.

How long the WTO can continue in its current constitutional structure, lacking the strategic steer needed adequately to address the complexity of the issues being raised before its panels and Appellate Body is a moot question. In the absence of the development of the advocated proto-constitutional framework the remaining question to be asked is to how well the EC can manoeuvre its CAP through the evolving Byzantine legal framework affecting agriculture at the WTO level, while still meeting the multifunctional demands of EC society and the agricultural provisions currently enshrined in the EC Treaty, and repeated in the provisions of the proposed EU Constitution. A definitive answer to this question

⁵⁶ Op. cit. footnote no. 54 at paragraph 92.

⁵⁷ Peers, Steve; *Reform of the European Community's Generalized System of Preferences*, J.W.T. 1995 29(6) 79-96, at page 93.

⁵⁸ As discussed in chapter 8.

⁵⁹ Also discussed in chapter 8.

will only be available after the conclusion of the current round of the WTO negotiations, and the final construction of the reforms of the CAP are in place, reforms which are due to follow the recent Mid-term review. The legal nexus between the EC and the WTO in the area of agriculture is still very much in flux.

The potential future trajectory of the EC CAP has been mapped out in the proposed EU Constitution, with its restatement of the multifunctional objectives for the CAP, together with the detail of the CAP being set down in the legal instruments of the mid-term review, and with the proposed development of the EC Rural Policy. The future development of the regulation of trade in agricultural commodities at the WTO level remains as yet unclear. Some indication of future trends can however be gleaned from the negotiations to date. The possible future “elimination of all export subsidies”, which still “remain important in a number of commodity regimes” such as milk, was indicated in the EC submission in May 2004, when Commissioners Lamy and Fischler, the then Trade and Agricultural Commissioners were prepared to negotiate on the basis of “full parallelism on all forms of competition”.⁶⁰ This was in reaction to a USTR press release of Robert Zoellick in January 2004 that he was prepared to eliminate all export subsidies by a certain date.⁶¹ In addition the US has been pressing for improved market access in all countries, both developing and developed countries, seeking that “tariffs on all agricultural products would be reduced below 25 percent”.⁶² Domestic support reduction is being championed by a reformed Cairns group, who are seeking “aggressive liberalization in all three pillars” of the WTO Agreement on Agriculture.

The ongoing negotiations have resulted in a three way split in the main negotiating parties in the area of agriculture, the interestingly named “Friends of

⁶⁰ Op. cit. footnote no. 21 at page 553.

⁶¹ Aggarwal, Rajesh; *Dynamics of Agricultural Negotiations in the World Trade Organisation*, J.W.T. 39(4): 741-761, 2005, at page 753.

⁶² Ibid. at page 742.

Multi-functionality of Agriculture”,⁶³ led by the EC, the Cairns group, this time supported by the U.S, and an as yet unorganised group of developing countries, whose concerns are “poverty alleviation” and “food security/ livelihood security”.⁶⁴ The earlier Harbison report, by the Chairperson of the Agricultural negotiations, Stuart Harbison, was able to report on the 7th July 2003⁶⁵ “compromise on a wide range of issues” in the market access debate, with the then discussion being on two competing tariff reduction formulas, “a simple average reduction formula along the lines of the formula used in the Uruguay Round” and a “Swiss-type formula”, “with the maximum tariff at the end of the implementation period being 25 per cent ad valorem for any tariff item”.⁶⁶ Harbison attempted to bridge the gap between supporters of the two options by suggesting a “graduated simple average reduction formula”. On export competition he was in a position to report progress in the area of export subsidies, export credits, food aid, with some debate continuing on the issue of state trading export enterprises, and export restrictions and taxes.⁶⁷ Discussion on domestic support was concentrating on blue box, amber box classifications, and de minimis levels of support.⁶⁸ Prior to the drafting of the July 2004 framework agreement a group called the “Five Interested Parties” (FIP) was set up at the instigation of the U.S., comprising itself, the EC, Australia, Brazil and India, was set up, “with a view to sort out differences among them”, as it was perceived that agreement between these five parties was a precondition to final agreement at the talks.⁶⁹ The July 2004 framework agreement⁷⁰ was able to report that a single approach to market access was going to be adopted, using a single “tiered formula that takes

⁶³ Ibid. at page 742.

⁶⁴ Ibid. at page 742.

⁶⁵ Modalities phase: chair’s report to TNC, July 2003, available at http://www.wto.org/english/tratop_e/agric_e/negoti_modtnc_july03_e.htm.

⁶⁶ Ibid. at pages 5, 6 and 7 of the report.

⁶⁷ Ibid. at pages 8 and 9 of the report.

⁶⁸ Ibid. at pages 9 and 10 of the report.

⁶⁹ Op. cit. footnote no. 61 at page 752.

⁷⁰ Found at Annex A to the Decision Adopted by the General Council on 1 August 2004, WT/L/579, available at http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm.

into account... different tariff structures” of the WTO member states.⁷¹ The framework agreement reported on agreement to work on modalities on export subsidies, export credits, export credit guarantees or insurance programmes, beyond 180 days, and provisions on food aid. On domestic support there was a call⁷² for “substantial reductions in trade-distorting domestic support”, stating what the negotiations were to focus on, but with no report as to any targets having been achieved on this topic. There was little reference in this document to non-trade concerns which have so exercised the minds of EC agricultural policy makers. There has to date been little progress since the July 2004 framework agreement.

The multifunctionality of agriculture argument of the EC continues, however, to be relevant to the current round of negotiations. The EC has been raising non-trade concerns covering six principal areas. As highlighted earlier in this thesis, they point out that there is a continuing need to address the issue of the precautionary principle under the SPS Agreement.⁷³ The “process characteristics” of how animals or plants are reared or grown is an issue for the EC under the TBT agreement. The EC are seeking “mandatory labelling” in this area, which would, *inter alia*, cover some of its concerns with regard to GM crops.⁷⁴ The EC also raise the issue of food security for developing countries. Their fourth non-trade concern deals with environmental issues of agricultural production,⁷⁵ with their fifth point being rural development,⁷⁶ and their sixth issue was animal welfare issues. Under animal welfare issues the EC is seeking to “enlarge the scope of the green box” to allow for payments to be made by way of compensation, outwith the Aggregate Measures of Support calculation, to cover the extra cost involved in maintaining high animal welfare standards.⁷⁷

⁷¹ Ibid. at paragraph 28.

⁷² Ibid. at paragraph 6.

⁷³ Op. cit. footnote no. 21 at page 556.

⁷⁴ Ibid. at page 556.

⁷⁵ Ibid. at page 556.

⁷⁶ Ibid. at page 556.

⁷⁷ Ibid. at page 556.

The above positions of the EC with regard to its non-trade concerns was to be expected, with the emergence into the WTO negotiations of animal welfare issues. It will be interesting to see how effective the EC will be in achieving its objectives at the WTO negotiating table. The WTO has to date, as discussed throughout this thesis, had problems addressing the EC's concerns in many of these areas. Some very original thought will have to be forthcoming at the WTO in order to meet the EC's aspirations in this area. What is clear however is that further clashes of these two levels of governance are likely in the absence of fresh thinking at one of those two levels. Law is the appropriate discipline with which to address these issues, while, despite the fact that the role of law at the WTO level is still contested, the EC clearly operates on the basis of the rule of law. If the EC proposes pursuing the current multi-functional approach to the CAP then greater originality of thought will have to be forthcoming at the EC level – as it is the EC with its greater coherence, greater consensus as to the role of law, and political unity of development of policy and purpose that has a proto-constitution, the EC treaty, already in place.

In contrast the larger more diverse membership at the WTO lacks the same facility to adjust and develop. The EC is in the better position to take evasive action to avoid the constitutional collision of the high judicial authorities. Whether the multifunctionality of EC Agricultural policy can continue to be justified on the basis of economics, ecology or social policy, is a matter for those disciplines to address, in light of imbalance of support for agricultural activities inside and outside the EC, and the need for the EC to balance its urban and rural objectives. The greater imagination of the EC policy makers, with the reliability of their legal tools, and the flexibility of their use by both EC legislature-executive and judiciary requires (in the absence of something close to a miracle emanating from the current round of WTO negotiations), the solution to the problems of the EC's multifunctional approach to the CAP to emanate from within the EC. The EC itself is a conceptual and legal experiment which has proven successful amongst member states with a shared history, underlying social

construct, and a shared legal tradition, albeit across two main classifications of law, the common law and civilian legal traditions. The successful results of that experiment have not, to date, been exported in their entirety, to other parts of the world. The EC lawyers and policy makers in the area of agriculture, now have an opportunity to further show its ingenuity and innovation in addressing the EC's non-trade concerns in a way which is legally effective within the EC, while being at the same time, WTO compliant. Allowing other member states of the WTO and other regions of the world to adopt concepts which have been successfully developed and operated within the EC will in the long term be probably be more effective in spreading the EC's policies in these areas, than setting the EC up in a conflict situation with the WTO and its member states in the short to medium term.

Annexes

Annex 1

GATT contracting parties, decision on November 28, 1979 on differential and more favourable treatment, reciprocity and fuller participation of developing countries GATT, 26th Supp. BISD 203 (1980).

Following negotiations within the framework of the Multilateral Trade Negotiations, the Contracting Parties decide as follows:

Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favorable treatment to developing countries, without according such treatment to other contracting parties.

The provisions of paragraphs 1 apply to the following:

Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,

Differential and more favorable treatment with respect to the provision of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;

Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the contracting Parties, for the mutual reduction or elimination of non-tariff measures, on products imported from one another;

Special treatment of the least developed among the developing countries in the context of any general or specific measures in favor of developing countries.

Any differential and more favorable treatment provided under this clause: shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;

shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;
shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1,2 and 3 above or subsequently taking action not introduce modification or withdrawal of the differential and more favorable treatment so provided shall:

notify the Contracting parties and furnish them with all the information they may deem appropriate relating to such action;

afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise.

The Contracting Parties shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with view to reaching solutions satisfactory to all such contracting parties.

The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs.

Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions of commitments made by them to reduce or remove tariffs and other barriers to the

trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.

The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basis objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs.

The contracting parties will collaborate in arrangements for review of the operation of these provisions, bearing in mind the need for individual and joint efforts by contracting parties to meet the development needs of developing countries and the objectives of the General Agreement.

(From John H. Jackson, William J. Davey and Alan O. Sykes, Jr. *Legal Problems of International Economic Relations; Cases and Materials and Text*, fourth edition, West Group, St. Paul, Minn, 2002.)

Annex 2. List of International Commodity Agreements and Related Arrangements¹

Cocoa

1972 International Cocoa Agreement

1975 International Cocoa Agreement

Coffee

1940 Inter-American Coffee Agreement

1962 International Coffee Agreement

1968 International Coffee Agreement

1976 International Coffee Agreement

Olive Oil

1955 International Olive Oil Agreement

1963 International Olive Oil Agreement

1967 Protocol for the Extension of the International Olive Oil Agreement

1979 International Olive Oil Agreement

Rubber

1922 Rubber Regulation Scheme

1934 Agreement for the Regulation and Export of Rubber

1938 Agreement for the Regulation and Export of Rubber

1944 Agreement on Establishing an International Rubber Study Committee

1979 International Natural Rubber Agreement

Sugar

1864 Paris Sugar convention

¹ Extracted from Kabir-ur-Rahman Khan; the Law and Organisation of International Commodity Agreements, Martinus Nijhoff Publishers, The Hague, 1982, at page XI.

1902 Brussels Sugar Convention

1937 Agreement Concerning the Regulation of Production and Marketing of
Sugar

1953 International Sugar Agreement

1956 International Sugar Agreement

1958 International Sugar Agreement

1968 International Sugar Agreement

1977 International Sugar Agreement

Tea

1933 International Tea Agreement

1938 International Tea Agreement

1951 International Tea Agreement

Tin

1931 Agreement on the International Tin control Scheme

1931 International Tin Pool Agreement

1933 Agreement on the International Tin Control Scheme

1934 Agreement on the Tin Buffer Stock Scheme

1937 Agreement on the International Tin Control Scheme

1938 Agreement on the Tin Buffer Stock Scheme

1942 Agreement on the International Control of the Production and Export of Tin

1956 International Tin Agreement

1960 International Tin Agreement

1965 International Tin Agreement

1970 International Tin Agreement

1975 International Tin Agreement

Wheat

1933 International Wheat Agreement

1949 International Wheat Agreement

1953 International Wheat Agreement
1956 International Wheat Agreement
1959 International Wheat Agreement
1962 International Wheat Agreement
1967 International Wheat Agreement
1971 International Wheat Agreement

Annex 3. Agricultural Adjustment Act, as amended, at the close of the first session of the 74th Congress, August 26, 1935

An Act

To relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled

TITLE I - AGRICUTURAL ADJUSTMENT²

DECLARATION OF EMERGENCY

That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing powers of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act.

IMPORTS

² Original Act was Title I of Public No. 10, 73d Congress (H.R. 3835) 48 Stat. 31 (1933); 7 U.S. C. Art. 601 et seq. By sec. 8 (a) of the National Industrial Recovery Act, title I may be referred to as the "Agricultural Adjustment Act".

Sec. 22(a.) Whenever the President has reason to believe that any one or more articles are being imported into the United States under such conditions and in sufficient quantities as to render or tend to render ineffective or materially interfere with any program or operation undertaken, or to reduce substantially the amount of any product processed in the United States from any commodity subject to any with respect to which an adjustment program is in operation, under this title he shall cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this section to determine such facts. Such investigation shall be made after due notice and opportunity for hearing to interested parties and shall be conducted subject to such regulations as the President shall specify.

(b) If, on the basis of such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by proclamation impose such limitations on the total quantities of any article or articles which may be imported as he finds and declares shown by such investigation to be necessary to prescribe in order that the entry of such article or articles will not render or tend to render ineffective or materially interfere with any program or operation undertaken, or will not reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which an adjustment program is in operation, under this title: Provided, that no limitation shall be imposed on the total quantity of any article which may be imported from any country which reduces such permissible total quantity to less than 50 per centum of the average annual quantity of such article which was imported from such country during the period from July 1, 1928, to June 30, 193, both dates inclusive.

(c.) No import restriction proclaimed by the President under this section nor any revocation, suspension, or modification thereof shall become effective until

fifteen days after the date of such proclamation, revocation, suspension, or modification.

(d.) Any decision of the President as to facts under this section shall be final.

(e) After investigation, report, finding, and declaration in the manner provided in the case of a proclamation issued pursuant to subsection (b.) of this section, any proclamation issued pursuant to subsection (b.) of this section, any proclamation or provision of such proclamation may be suspended by the President whenever he finds that the circumstances requiring the proclamation or provision thereof no longer exist, or may be modified by the President whenever the finds that changed circumstances require such modification to carry out the purposes of this section.

"Sec. 22" was added by sec. 31 of Public No. 320, 74th Congress, approved August 24, 1935"

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ARTICLE

On the Boundary Clash between EC Commercial Law
and WTO Law

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On the Boundary Clash between EC Commercial Law and WTO Law

Maria O'Neill*

Abstract

Both the WTO and the EC have come to a crossroads in their development. The WTO is currently the subject of the Doha round of negotiations, while the EC, together with pillars II and III of the EU, is about to be re-constituted under the draft European Constitution. The issue of the articulation between these two legal systems, despite the best efforts of legal academics over the years, remains unresolved, as evidenced in the recent case of *Biret International SA v. Council*.¹ Issues which were resolved in the early years of the EC on the nexus of the relationship between the EC and the laws of its member states, are now reappearing at the EC-WTO nexus. The EC-Member State principles of supremacy,² direct effect³ and state liability for the non-implementation of directives⁴ are now being echoed at the WTO-EC nexus, in the context of direct effect,⁵ legality control, and indirect effect. The *Biret* case raised the issue of 'no-fault liability for the Community' for non-compliance with WTO law, echoing discourses many years earlier at the EC-MS nexus. The issue of the boundary demarcations between EC Commercial law and WTO law merits re-examination in light of these developments, with the continuing imperfect legal articulation between these two jurisdictions resulting in a boundary clash which requires a resolution. Ideally this resolution would come in the form of a treaty amendment drafted by the member states of the EU. In this respect the draft Constitution, which fails to adequately address this issue, could be seen as a missed opportunity. The ECJ may well find itself obliged to develop the resolution based upon the Advocate General's opinion in the *Biret* case.

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1. Cases C-93/02, and Case-94/02, *Biret International SA v. Council of the European Union*, ECR 2003.
2. Case 6/64, *Costa v. ENEL*, [1964] ECR 405, [1966] CMLR 111. et al.
3. Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1, [1963] CMLR 105, Case 41/74, *Van Duyn v. Home Office* [1974] ECR 1405, [1975] 1 CMLR 1 et al.
4. Case C-6, 9/90, *Francovich and Others v. Italy*, [1991] ECR 5357, [1993] 3 CMLR 66, et al.
5. Case C-149/96, *Portuguese Republic v. Council of the European Union*, Official Journal C 47, 19/02/2000 p. 8 (Judgment of the Court of 23 November 1999).

1. Introduction

Biret International SA v. Council,⁶ raised the possibility of the development of 'no-fault liability for the Community in respect of its normative acts' where there had been a Dispute Settlement Body (DSB) ruling on the non-compliance of EC law with WTO law. The CFI rejected this possibility finding that 'the purpose of the WTO agreements is to govern relations between States for economic integration... and not to protect individuals'.⁷ The CFI reaffirmed the findings in *Portugal v. Council*,⁸ following the *Fedoil*⁹ and *Nakajima*¹⁰ hypothesis, and found that the facts of the *Biret* case did not fall within the two exceptions to the rule that WTO law did not have direct effect in EC law. It further found that the ruling of the DSB did not alter the EC's law in this area, finding that a ruling of the DSB would only become relevant if the Court had found that the agreement in question, in this instance the SPS agreement, had direct effect, which was not the finding of the CFI in this case. The case was appealed to the ECJ, with the opinion of Advocate General Alber providing a new perspective on this issue.

Building on *Germany v. Council*,¹¹ the ECJ in *Portugal*¹² found that 'in conformity with the principles of public international law', the EC was free to conclude an agreement with a non-EC member state, which could be made to have effect within the 'internal legal order of the contracting parties'.¹³ Further, it held that it was only in the absence of such an express agreement that the ECJ would have to determine what legal effect, if any, such an agreement would have within the EC legal jurisdiction.¹⁴ Under international law, it was

6. Op. cit. note 1.

7. At point 72 of the judgment of the ECJ.

8. Op. cit. note 5.

9. Case 70/87 *Fedoil v. Commission* [1989] ECR 1781. Here the ECJ found that it was not prevented 'from interpreting and applying the rules of GATT with reference to a given case, in order to establish whether certain specific commercial practices should be considered incompatible with those rules' (at para. 20), and that the fact that the regulation in question, (Council Regulation (EEC) No 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices, Official Journal L 252, 20/09/1984 p. 1) entitled 'economic agents ... to rely on the GATT provisions ... in order to establish the illicit nature of the commercial practices which they consider to have harmed them' and that said economic agents were 'entitled to request the Court to exercise its powers of review over the legality of the Commission's decision applying those provisions' (at para. 22 of the judgment).

10. Case C-69/89 *Nakajima All Precision v. Council* [1991] ECR I-2069. In this case the relevant EC Regulation had been adopted 'in order to comply with the international obligations of the Community', (at para. 31) thereby becoming subject to judicial review for compliance with, in this case, Arts. 2(4) and (6) of the GATT Anti-Dumping Code (at para. 32 of the judgment).

11. Case C-280/93 *Germany v. Council* [1994] ECR I- 4973.

12. Op. cit. note 5.

13. Ibid., at para. 34 of the judgment.

14. Relying on Case 104/81 *Hauptzollamt Mainz v. Kupferberg* [1982] ECR 3641, para. 17.

recognised by the ECJ that there was an obligation for the 'bona fide performance of every agreement'; however, this in itself did not determine what legal effect that international agreement would have within the domestic jurisdiction of the contracting parties.¹⁵ This approach was echoed at the WTO level by the panel in *United States – Sections 301–310 of the Trade Act of 1974*.¹⁶ This panel, ruling on US law, and referring to the doctrine of direct effect, stated that; 'Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect'. Following this approach, the GATT/WTO did not create a new legal order, the subjects of which comprise both contracting parties or members and their nationals.¹⁷ However, as pointed out by Zonnekeyn, the panel report does have an interesting aside in a footnote¹⁸ that the issue of whether WTO agreements would 'create rights for individuals', which national courts would have to protect, 'remains an open question, in particular in respect of obligations following the exhaustion of DSU procedures in a specific dispute'.¹⁹ In addition, the panel reserved the right to the WTO to 'construe any obligations as having direct effect', and that, in the absence of such construction, member states of the WTO were not precluded from 'following internal constitutional principles', finding that some obligations 'give rights to individuals'.²⁰

The above findings formed the legal backdrop to the opinion of Advocate General Alber in the *Biret* case. The intervening years between *Portugal* and *Biret* had, however, seen the development of an intense academic discourse in this area, and saw a number of further cases appearing before the CFI and ECJ. Of particular interest to this author is Van Houtte's highlighting of the 'political aspect' of the ECJ's decision in the *Portugal* case, given that the ECJ took into consideration issues outside the confines of its own legal system, such as the fact that the EC's contracting parties at the WTO concluded that WTO rules did not have direct effect within their own legal systems.²¹ Reliance was made on the 'reciprocal character of the WTO Agreements' with the WTO being seen as a 'forum for negotiations', which some commentators referred to as being 'anachronistic'.²² However, other commentators took it as being fair comment with Ehlermann warning against unduly tying the 'hands

15. Op. cit. note no.12, at para. 35 of the judgment.

16. *United States – Sections 301–310 of the Trade Act of 1974*, report of the panel released on 22 December 1999, WT/DS152/R, at para. 7.72

17. Geert A. Zonnekeyn, 'The Status of WTO Law in the EC Legal Order; The Final Curtain?', *Journal of World Trade* 34(3): 111–125, 2000.

18. Note 661.

19. Op. cit. note 17.

20. Ibid.

21. Hans van Houtte, *The Law of International Trade*, Sweet & Maxwell, London, 1995.

22. Op. cit. note 17.

of the Community negotiators'.²³ The WTO bodies' lack of democratic accountability has been highlighted by Rosas, who pointed out that 'granting direct effect to WTO rules would play into the hands of the likes of anti-globalisation protestors', and 'could instead deprive the democratic institutions of the EU and other WTO members of the margin of manoeuvre they currently possess so as to strike a balance between trade and societal values'.²⁴

2. Grappling with the Problem

The academic discourse had developed the concepts of the non-reciprocity of direct effect,²⁵ legality control²⁶ and indirect effect.²⁷ The legality control argument in particular gave rise to a politically pragmatic response from the ECJ in the *Portugal* case, when it implied 'that legal control of acts' of EC institutions pursuant to WTO law would be 'impossible because the ECJ must leave the necessary 'freedom' to the EC legislator in order not to endanger the EC's future negotiating position towards its trading partners in the WTO'.²⁸ Zonnekeyn sees this as not being a legal argument but rather a political one, being 'an obvious assault to the 'trias politica' principle, which ought to be the cornerstone of every legal system'.²⁹ The view therefore being adopted was that the 'absence of direct effect of an international agreement protected the validity of Community acts'.³⁰ These above attempts to rationalise the legal relationship between the EC and the WTO have been reflected in the jurisprudence of fellow members of the WTO, most notably in the US and Japan, with interesting observations to be made on the Italian case law, before it came under the influence of the ECJ's line on this matter.

23. Ibid.

24. Allan Rosas, Case Note; Case C-149/96, *Portugal v. Council*, Judgment of the full Court of 23 November 1999, *Common Market Law Review* 37: 797–816, 2000.

25. Initially raised by AG Tesaro in the *Hermès* case (Case C-53/96 (reference for a preliminary ruling from the Arrondissementsrechtbank de Amsterdam), *Hermès International v. FHT Marketing Choice BV*, Official Journal C 258, 15/08/1998, p. 9), and commented on by Geert A. Zonnekeyn in 'The Status of WTO Law in the EC Legal Order: The Final Curtain?', *Journal of World Trade* 34(3): 111–125, 2000, and Axel Desmedt, 'European Court of Justice on the Effect of the WTO Agreements in the EC Legal Order', *LIEI* 2000 7(1), 93–101.

26. Axel Desmedt; European Court of Justice on the Effect of the 'WTO Agreements in the EC Legal Order', *LIEI*, 200 27(1), 93–101

27. Op. cit. note no. 24.

28. Op. cit. note no. 17.

29. Ibid.

30. Ibid.

3. Trends in International Case Law

The trends of the case law of the US and Japan match, to a certain extent, the development of the approach of the ECJ to the EC's relationship with the WTO for the same period. It would appear that there was a movement from initially viewing GATT 47 as having, or having the potential to have, direct effect. As GATT and the WTO laws become more complex and profound, there has been a retreat from this initial position with the development of a conclusion that perhaps the WTO legal regime may not have direct effect after all in domestic jurisdictions.

3.1. US

At the GATT panel level, the issue of the direct effect of GATT 47 provisions arose in the panel report of *United States: Alcoholic and malt beverages*,³¹ which held that the then-version of 'Article XXIV:12³² was not applicable to the United States' as the panel noted, at 5.79 of its ruling, that these provisions were 'designed to apply only to those measures by regional or local governments or authorities which the central government cannot control'. They were convinced, on the basis of the writing of Jackson and Hudec, that 'GATT law had become part of US federal law, and since federal law, according to the US Constitution, is supreme over state law, any inconsistent state law had to give way before GATT'.³³ This issue was addressed in the Uruguay Round 'Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994', which is now complemented by Article 22(9) of the DSU.³⁴ The article addresses the issue of federal states being responsible for the actions of its constituent states, which, in the absence of control being enforced by the federal government on the sub-national government, imposes 'compensation and suspension of concessions' provisions on the federal state.³⁵

31. *United States: Alcoholic and malt beverages*, Panel Report, (DS23/R BISD 39S/206) adopted on 19 June 1992, para. 5.78–5.80. p. 206.

32. Which provides the 'Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories'.

33. Pieter Jan Kuijper, 'The New WTO Dispute Settlement System; the Impact on the European Community', JWT 1995, 29(6), pp. 49–71.

34. It provides that 'The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a member.' When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreement and this Understanding relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.

35. Op. cit. note 33.

To the astonishment of Kuijper,³⁶ the US had managed, through its implementing legislation and its accompanying statement of administrative action, to reduce 'itself to the same situation as the EC' by expressly 'limiting the supremacy of federal law over state law', and thereby to largely 'undo the consequences of' the adopted panel report in *United States: Alcoholic and malt beverages*.³⁷ The current situation is that the US federal government can only force a state government to comply with WTO provisions by way of the federal government taking a court action 'comparable to action pursuant to Article 169 of the EC Treaty' (now Article 226 EC) against the state concerned.³⁸ It should be noted that the WTO agreements now contain 'an elaborate mechanism for consultation with state authorities with a view to guaranteeing that state law is in conformity with the WTO Agreement and its Annexes'.³⁹

3.2. Japan

In Japan, Iwasawa⁴⁰ referred to two domestic Japanese cases, which addressed the issue of the direct applicability of GATT in Japan, namely the *Kolbe Jewellery* case⁴¹ and the later *Kyoto Neckties* case.⁴² Under Japanese law, 'treaties are accorded a high authority', overriding statutes, even those subsequently enacted, under Article 98(2) of the Japanese Constitution. Following this approach, the courts in the *Kolbe Jewellery* case suggested that GATT 47 had direct effect within Japan. The later *Kyoto Neckties* case caused uproar in Japanese legal academic circles when the Kyoto District court's judgement, 'apparently denying the direct applicability of the GATT', was endorsed by the Japanese Supreme Court in 1990. This was a 'poorly reasoned case' according to Iwasawa and another academic, Professor Matsushita, who claimed that the courts in *Kyoto Neckties* seemed 'to ignore Article 98(2) of the constitution'.⁴³ This was a strange claim to lay at the feet of any Supreme Court, leading to the possible conclusion that the decision was taken for unexpressed politically

36. Ibid.

37. Op. cit. note 31.

38. Op. cit. note 33.

39. Ibid.

40. Yuji Iwasawa, 'Implementation of International Trade Agreements in Japan', in Meinhard Hilf and Ernst-Ulrich Petersmann (eds.), *National Constitutions and International Economic Law*, Kluwer 1993, ISBN 90 6544 665 6.

41. *Kolbe Jewellery*: the relevant judgment was that of May 30, 1966, Kolbe District Court, 3 *Kakeishkū* 519, 524 – 25.

42. *Kyoto Neckties* case: the relevant judgment here was the Judgment of June 29, 1984, Kyoto District court, 31 *Shōmu Geppō* 207, which seems to have been endorsed by the Judgment of Feb. 6, 1990, Supreme Court, slip op.

43. Op. cit. note 40.

pragmatic reasons, along the lines taken by the ECJ in the later (1999) *Portuguese Textiles* case.⁴⁴

3.3. Italy

An interesting line of GATT jurisprudence can be seen within the EC on the issue of the direct effect of GATT 47 within the Italian jurisdiction. During the latter part of the 1960s, the Italian lower and appeals court had ruled that 'Article III, para. 2 of GATT'⁴⁵ conferred on private parties a right to invoke it before the courts', leading to the Italian state being ordered to reimburse GATT illegal taxes levied on importers. While the ECJ held that the EC had been substituted for the Member States with regard to commitments under the GATT from 1 July 1968 with the introduction of the Common Customs Tariff,⁴⁶ the Italian Corte di Cassazione was upholding, in 1968, the findings of its lower courts with regard to Article III, para. 2 of GATT.⁴⁷ Since that finding, however, the impact of the ruling had 'progressively lost significance in practice',⁴⁸ with the Italian courts beginning to reverse its position on GATT 47 in subsequent cases. During the 1970's, while the ECJ was holding that in *International Fruit*⁴⁹ that GATT 1947 was binding on the Community, the Italian courts were 'developing the concept' that GATT 47 had direct effect, and that 'specific provisions may be considered as self-executing' in light of their particular content, independent of other provisions of the agreement and regardless of 'elements such as the absence of a jurisdiction for the settle-

44. Op. cit. note 5.

45. It provides that 'The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in para. 1.'

46. *Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)* (reference for a preliminary ruling from the Corte Suprema di Cassazione). Joined Cases 267 – 269/81 [1982] ECR 801.

47. Judgment No. 2293, 6 July 1968, *Ministero delle Finanze v. Cotonificio Valle Ticino s.p.a., Foro Italiano* 1968, I. 2462; Giust. Civ. 1968, I, 1571; Riv. dir. int. 1969, 328; Dir. Scambi int. 1968, 504.

48. Carlo Mastellone; Case Report on Case 266/81, *SIOT (Società Italiana per l'Oleodotto Transalpino) s.p.a. v. Ministero delle Finanze, Ministero della Marina Mercantile, Circonscrizione doganale di Trieste, Ente autonomo del porto di Trieste*. Preliminary Ruling of 16 March 1983 requested by the Italian Corte di Cassazione, and Joined Cases 267-269/81, *Amministrazione delle Finanze dello Stato v. S.P.I. (Società Petrolifera Italiana) s.p.a.* (267/81) and *Amministrazione delle Finanze dello Stato v. S.A.M.I. (S.p.a. Michelin Italiana)* (268–269/81). Preliminary ruling of 16 March 1983 requested by the Italian Corte di Cassazione, CML Rev 20: 559–580, p. 559.

49. *International Fruit Company N.V. and others v. Produktschap Voor Groenten en fruit (No 3)*, Case 21 – 24 (72).

ment of disputes'.⁵⁰ The Italian courts were aware that the ECJ had taken a different line on this issue, with the Corte di Cassazione stating that, in comparison to the ECJ line, its view was wider than that of the ECJ. It also recognised that different member states of the EC might take different positions on the legal effect of GATT 47, holding that 'GATT could not be considered a Community act under (the then) Article 177'.⁵¹ However, by the time of the *SIOT* and *SAMI* references to the ECJ in 1983 by the Corte di Cassazione, the Italian judiciary were happy to follow the ECJ's line on the legal status of the GATT 47, thereby reversing their earlier case law on the matter.

4. More Recent Cases

As stated earlier, a number of cases were heard by the ECJ and the CFI between *Portugal v. Council* and the *Biret* case, during which the issue of the legal relationship between the EC and the WTO arose. These cases, for the most part, which mainly dealt with bananas, are *Atlanta*,⁵² and what have become known as the 'March 2001' judgments, of *Cordis*,⁵³ *Bocchi Food*⁵⁴ and *T.Port*.⁵⁵ The *Atlanta* case was heard at the CFI, from where an appeal was made to the ECJ, where the issue of the relationship between the EC and the WTO was argued. The ECJ, in its judgment, confined itself to procedural issues and did not address directly the substantive issue of the relationship between the EC and the WTO as the plea on this matter was not included in the original appeal documentation and was, therefore, deemed inadmissible. The Advocate General did address the issue in his opinion. The 'March 2001' judgements were all heard at the CFI level. Only *T.Port* was appealed to the ECJ,⁵⁶ but on appeal the ECJ only addressed the issue of the CFI's calculation of reference quantities.

In the *Atlanta* case at the ECJ, protection of legitimate expectations was pleaded. While the Advocate General recognised that this was 'one of the fundamental principles of the Community, as the Community retained a discretion as to its running of its common markets', traders had no legitimate

50. Op. cit. note 48.

51. Ibid.

52. Case C-104/97P, *Atlanta AG v. European Community*, [2001] 1 CMLR 20.

53. Case T-18/99, *Cordis Obst und Gemüse Großhandel GmbH v. Commission of the European Communities*, ECR 2001 page II-00913.

54. Case T-30/99, *Bocchi Food Trade International GmbH v. Commission of the European Communities*, ECR 2001 page II-00943.

55. Case T-52/99, *T. Port GmbH & Co. KG v. Commission of the European Communities*, ECR 2001 page II-00981.

56. Ibid.

expectation that an existing situation would be maintained when the Community institutions could alter it in the exercise of their discretionary powers.⁵⁷ Further, the claim for non-contractual liability of the Community under Article 215 required 'proof of illegal conduct, damage and a causal link',⁵⁸ and, in AG Mischo's view, the claimants fell at the first hurdle, proof of illegal conduct. The claim in this case was that, in light of the findings at the WTO in *EC-Bananas*⁵⁹ on the issue of the EC banana regime, the EC provisions were now illegal, not that the EC provisions dealing with the common organisation of bananas was in breach of the 'substantive GATT provisions or those of the WTO'. The claimant therefore claimed that the 'legislative provisions having been applied to the appellant in disregard of the binding effect on the Community of the decision of the WTO Dispute Settlement Body'.⁶⁰

The AG stated that this plea was inadmissible as it had not been entered in the original appeal documentation from the CFI. However, utilising the common law technique of an *obiter dicta*, the AG stated that in any event, following the case of *Commission v. Germany*,⁶¹ the appellant could 'not profitably set up the incompatibility of Regulation 404/93 with the WTO Agreement to contest the reasoning of the Court of First Instance'.⁶² Going even further down the *obiter dicta* line, even the claim that EC law was in conflict with a decision of the Dispute Settlement Body 'would not assist the appellant's case',⁶³ on the basis that even a ruling of the Appellate Body of the DSU does not 'impose on the party whose legislation is found to be contrary to the WTO provisions a duty immediately to amend that legislation'.⁶⁴ The AG went on to say that 'Clearly... the rights which a decision of the Appellate Body would intend to confer on individuals have nowhere near the scope which the appellant seeks to give them'.⁶⁵ This is particularly in light of the fact that, as pointed out by Zonnekeyn, 'Article 22 of the DSU gives WTO members the possibility of maintaining the unlawful measures in place beyond the reasonable period of time if the parties to the dispute have agreed on a suitable compensation'.⁶⁶

In the *Cordis* case,⁶⁷ which was heard by the CFI, it was reiterated that 'the

57. Ibid. at H8 of the report.

58. Ibid at H9 of the report.

59. *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body. WT/DS27/AB/R, 9 September 1997.

60. At point A19 of the AG's opinion.

61. Case C-280/93 *Germany v. Council* [1994] ECR I- 4973.

62. Ibid at A23 of the report.

63. Ibid at A24 of the report.

64. Ibid at A27 of the report.

65. Ibid at A30 of the report.

66. Op. cit. note 17.

67. Op. cit. note 53.

WTO Agreement and its annexes are not intended to confer rights on individuals which they could rely on in court',⁶⁸ nor could the Community incur 'non-contractual liability as a result of infringement of them'.⁶⁹ The position in *Portugal v. Council*⁷⁰ whereby, despite the significant differences between GATT 1947 and the WTO Agreement, they both 'nevertheless accord considerable importance to negotiation between the parties'⁷¹ was reaffirmed. The issue of the possibility of an imbalance of obligations between member states of the WTO, should the ECJ take any other line, was also addressed. The CFI also reaffirmed the ECJ's line in *Portugal v. Council* that the Community judicature could not 'deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by' the Community's trading partners within the WTO.⁷²

The argument was made in this case that there should be developed a 'new category of misuse of powers' to the extent that the Commission adopted a regulation in breach of WTO obligations. This was rejected outright. It is established case law of the ECJ that misuse of powers can only be claimed if legislation is 'adopted with the exclusive or main purpose of achieving an end other than that stated',⁷³ but such an allegation was not being made, or could not be made, by the applicants in the *Cordis* case. The claim that a new category of misuse of powers existed should therefore be rejected. The CFI reaffirmed that, following *Portugal v. Council*, that 'it is only where the Community intends to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the agreements contained in the annexes to the WTO Agreement, that it is for the Court of Justice and the Court of First Instance to review the legality of the Community measure in question in the light of the WTO rules'.⁷⁴ As neither the WTO panel report (22nd May 1997)⁷⁵ nor the Appellate Body report (9th September 1997)⁷⁶ 'included any special obligations which the Commission intended to implement, within the meaning of the case-law',⁷⁷ in Regulation No. 2362/98,⁷⁸ therefore such a claim could not be made here.

68. Ibid at point 45.

69. Ibid at para. 50.

70. Op. cit. note 5.

71. Ibid at para. 47.

72. Ibid at para. 49.

73. Ibid at para. 53.

74. Ibid at para. 58.

75. *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Panel Report, 22nd May 1997, WT/DS27.

76. Op. cit. note 59.

77. Specifically Case C-69/89, *Nakajima v. Council*, [1991] ECR I-2069.

78. Ibid at para. 59.

In *Bocchi Foods*,⁷⁹ the arguments and the findings of the CFI followed closely those of the *Cordis* case. The *T.Port*⁸⁰ CFI case followed closely both the arguments and findings of *Bocchi Foods* and *Cordis* with the CFI stating that 'it should be noted that it is clear from Community case-law that the WTO Agreement and its annexes are not intended to confer rights on individuals which they could rely on in court'.⁸¹ The CFI restated the position in *Portugal v. Council* by saying that 'it is only where the Community intends to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the agreements contained in the annexes to the WTO Agreement, that it is for the Court of Justice and the Court of First Instance to review the legality of the Community measure in question in the light of the WTO rules'.⁸²

With reference to the March 2001 judgements, Peers is of the view⁸³ that the CFI was in error in concluding that the 'implementation exceptions' could be 'deduced from previous case law'. Peers argues that, while previous case law certainly did clarify the position with regard to the 1993 Regulation dealing with bananas, 'it had not ruled on the applicability of those exceptions to subsequent amendments of the Regulation'. He advocates that it is 'strongly arguable' that the purpose of the 1998 Council Regulation was 'related to a WTO obligation'.⁸⁴ Peers goes on to point out that the 1998 regulation 'expressly states in its preamble that 'the Community's international commitments under the World Trade Organisation' should be met'. He further points out that the 'the explanatory memorandum accompanying the proposal for a Council Regulation stated that the Council should 'amend Regulation (EEC) No. 404/93 to bring it into line with our international commitments within the framework of the WTO' and that a 'system of import licences compatible with the WTO should be introduced'.⁸⁵ In light of this persuasive argument, it is hard to ignore Peers' view that it is difficult to distinguish between a measure 'being adopted 'in order to comply' with the WTO ruling', as the 1998 regulation clearly is, and a measure 'intending to implement a WTO obligation'.⁸⁶

79. Op. cit. note 54.

80. Op. cit. note 55.

81. Ibid. at para. 45.

82. Ibid. at para. 57.

83. Steve Peers, *WTO dispute settlement and Community Law* (2001) 26 ELRev, 605.

84. Ibid.

85. Ibid.

86. Ibid.

5. The *Biret* Case in the ECJ

All of these cases brings us to the *Biret* case,⁸⁷ and the opinion of Advocate General Alber, which merits examination. The claimant in this case, *Biret* requested that the CFI should develop 'its case-law in the direction of a system of no-fault liability for the Community in respect of its normative acts'. This claim was rejected on the basis that this plea was introduced late in the proceedings and should have formed part of the original pleadings in this case. Problems also arose with the pleadings on appeal, so that the effect of the DSB ruling was not properly ruled on by the ECJ. The ECJ did however state that it had to take into consideration the period of time given by the WTO to the EC to amend its laws, and any examination of liability of EC institutions for the non-amendment of laws within that time period would 'render ineffective the grant of a reasonable period for compliance' with the DSB ruling.⁸⁸ The ECJ therefore found that no damage could be proven to have occurred after the 'reasonable period for compliance', so it did not have to rule further on the matter. It also avoided ruling on the second plea, 'concerning the Community's alleged no fault liability' as it had been submitted too late to be considered.

The opinion of AG Alber in the ECJ case does however cast a different light on the issues raised in *Biret*. At point 83 of his opinion, he states that a ruling of the DSB removes the margin of manoeuvre of WTO contracting parties, with the obligation being to implement the findings of the DSB immediately and without condition. This, therefore, alters the nature of the obligation of the WTO member states, as there is, after a DSB ruling, an 'obligation sufficiently clear and precise'. He did recognise, however, that there was a need for a community legislative measure to put in place the provisions of the legislative changes in this situation.⁸⁹ He went on to say that, from the point of view of Community law, the right of the free exercise of economic activities would be in favour of the recognition of direct effect of the rulings of the DSB, after the expiration of a reasonable delay for amending EC law.⁹⁰ In such a situation, Alber is also of the opinion that there would be a case for recognising the possibility of bringing a case for compensation for EC non-compliance with WTO law.⁹¹

This opinion of the Advocate General, should it be adopted in a future ECJ ruling, would provide a third exception to be added to the *Fedoil*⁹² and

87. Op. cit. note 1.

88. At point 65 of the judgement of the ECJ.

89. At point 89 of the opinion.

90. Point 110 of the opinion.

91. At point 112 of the opinion.

92. Op. cit. note 9.

*Nakajima*⁹³ exceptions to the rule that WTO law does not have direct effect within EC law. These two exceptions, as confirmed in the *Atlanta* case,⁹⁴ are the only ones that currently hold, with a continuing large area of interface between EC and WTO law being subject to a 'boundary clash'. The question therefore arises that if a case comes before the ECJ, a 'post-*Biret*' case where damage can be proven to have occurred after a 'reasonable period for compliance has passed' and a plea is entered timeously for the Community to develop 'a system of no fault liability in respect of its normative acts' will the ECJ distinguish the *Biret* ruling, and adopt the reasoning of AG Alber in that case. Will the judges of the ECJ, on the other hand, more conscious of the political position of the ECJ within the EC/EU legal framework, give further meat to Ehlermann and Rosas's⁹⁵ argument against unduly tying the 'hands of the Community negotiations' recognising the severe democratic deficit at the WTO. The draft EU Constitution merits some examination to see if it sheds any light on this matter.

6. The Constitutional Aspect of the Relationship with Member State Legislation

The EU is currently drafting a 'Constitution for Europe'. This document is intended to address many of the recurrent constitutional problems of the EC/EU. Article III-315 of the draft Constitution, (after signature), reflecting a rebalancing of power between the Council of Ministers and the Commission, and the adoption of European laws and Framework laws as the new secondary legislative tools under the Constitution, closely matches the provisions of the current Article 133 EC. The CCP is, however, extended by the draft Constitution to cover not just 'trade in goods' and the post Nice Article 133 provisions on trade in services and the commercial aspects of intellectual property, but also to foreign direct investment. The unanimity requirements for voting in the Council of Ministers in the field of services and intellectual property is preserved and is also extended to cover the 'negotiation and conclusion of agreements in the field of trade in cultural and audiovisual services',⁹⁶ with specific provisions being also made for the conclusion of transport agreements.⁹⁷ It would appear, from the current draft of the Constitution, that no such unanimity will be required for international agreements on foreign direct

93. Op. cit. note 10

94. Op. cit. note 52.

95. Op. cit. note 24.

96. Art. II-317 of the draft 'Constitution for Europe'.

97. Which makes the conclusion of agreements under this title, *inter alia*, subject to CFSP provisions.

investment. What is new, however, is the statement at the end of Article III-315 that the CCP 'shall be conducted in the context of the principles and objectives of the Union's external action', possibly bringing the CCP under the influence of the more robust provisions being introduced for the EU's Common Foreign and Security Policy (CFSP) by the draft Constitution.

6.1. *The Issue of Exclusive Competence*

Factors which might influence the ECJ in a post *Biret* judgment would be the issue of exclusive competence and subsidiarity in the post 'draft Constitution'. As stated by Lord Slynn of Hadley,⁹⁸ the currently numbered Article 133 EC⁹⁹ 'has raised in particular difficult questions' as to the competence of the EC and, through it, the competence of the EC Commission together with the issue of the relationship between the EC and its member states. This is complicated by the fact that the ECJ, in *Opinion 1/78*,¹⁰⁰ found that the CCP had a dynamic and evolutionary character', and that the EC must have 'the possibility ... to take account of new needs and new developments'.¹⁰¹ This approach is reflected in *Opinion 2/91*,¹⁰² when the ECJ stated, developing from the *ERTA* judgment,¹⁰³ that the 'principle of exclusivity' cannot be limited to areas where the EC has 'adopted rules within the framework of a common policy, but is applicable in all areas corresponding to the objectives of the Treaty'.¹⁰⁴

In *Opinion 1/94*, the ECJ provided that the now numbered Articles 95 EC¹⁰⁵ and Article 308 EC¹⁰⁶ could not 'in themselves confer exclusive competence on the Community'.¹⁰⁷ The draft Constitution addresses the issue of exclusive and shared competence in its Articles 12 and 13, referred to above,

98. Lord Slynn of Hadley in the forward to Emiliou and O'Keeffe, *The European Union and World Trade Law after the GATT Uruguay Round*, John Wiley and Sons, 1996.

99. It should be pointed out that the expanse of Art. 133 EC was extended by the Nice Treaty to GATS and TRIPS.

100. *Opinion 1/78 on the International Rubber Agreement*, [1979] ECR 2871.

101. Jacques H.J. Burgeois, 'The Uruguay Round of GATT: Some General Comments from an EC Standpoint', Ch 6 in Emiliou and O'Keeffe, *The European Union and World Trade Law after the GATT Uruguay Round*, John Wiley and Sons, 1996.

102. *Opinion of the Court of 19 March 1993. Opinion delivered pursuant to the second subparagraph of Art. 228 (1) of the EEC Treaty. Convention No 170 of the International Labour Organization concerning safety in the use of chemicals at work. Opinion 2/91*, ECR 1993 page 1061.

103. Case 22/70 *Commission v. Council* [1971] ECR-263 (the *ERTA/AETR* judgment).

104. Nicholas Emiliou, 'The Allocation of Competence Between the EC and its Member States in the Sphere of External Relations', Ch 3 in Emiliou and O'Keeffe, *The European Union and World Trade Law after the GATT Uruguay Round*, John Wiley and Sons, 1996.

105. Ex Art. 100a EC.

106. Ex Art. 235 EC.

107. *Opinion 1/94*, [1994] ECR 5264.

with the newly expanded CCP being an area of exclusive competence, and shared competence, under Article 13 being 'where the Constitution confers (on the Union) a competence which does not relate to the areas referred to in Articles 12 (*inter alia*, the CCP), and 16'. Article 16 provides for 'supporting, coordinating or complementary action', and contains both industry and public health issues, which might be relevant to the CCP. Shared competence is attributed, *inter alia*, to the internal market, agricultural and fisheries, (excluding the conservation of marine biological resources), social policy, the environment, consumer protection and public health issues.

As is pointed out by Craig, rather than conducting a 'root and branch reconsideration' of the issue of competence and subsidiarity, the draft Convention adopted the approach of the maintenance of the status quo, but where a shift was made on competence, it had a 'general tendency ...to reinforce EU power, not to 'repatriate' it to the Member States.'¹⁰⁸ It could perhaps be said that the issue of exclusive and non-exclusive competence may not be finally resolved by the draft Constitution, should it come into force. An outstanding problem, relevant to this paper, will be the tension between the Customs Union policy, an area of exclusive competence and 'other aspects of the internal market' which is usually shared competence.¹⁰⁹ In addition, the EU's exclusive external competence, under the post signature Article I-13(2) when the internal competence is not exclusively the EU's, retains 'difficulties in terms of clarity'.¹¹⁰ In order to resolve this issue, both to date, and in this writer's opinion in the future, in the absence of clarity from the EC Treaty or the proposed Constitution, this matter has to be analysed through the use of principles developed by the ECJ, which in themselves are not clear.

What is clear, in the matter of GATT/WTO Agreements, is that the Member States of the EC have 'retained competence over budgetary matters'¹¹¹ relating to WTO membership. In addition, Emilou, quotes Timmermans¹¹² as arguing that, under the current legal framework, even in the area of CAP common organisations, EC member states, even in this highly occupied field, 'retained a parallel power to adopt national measures provided that they did not jeopardise the objectives and functioning of the common markets';¹¹³ however, EC member states would be precluded from entering into international agreements in such policy areas. Emilou also points out, relying on

108. Paul Craig, *Competence: Clarity, Conferral, Containment and Consideration* (2004) 29 E.L.Rev. 323.

109. Ibid.

110. Ibid.

111. Eileen Denza, 'The Community as a Member of International Organizations', Ch 1 in Emiliou and O'Keeffe, *The European Union and World Trade Law after the GATT Uruguay Round*, John Wiley and Sons, 1996.

112. From an article in Dutch by Timmermans at [1978] SEQ 276.

113. Op. cit. note 104.

Kapteyn,¹¹⁴ that in areas where there are no such common policies, EC member states were not so restricted.¹¹⁵ In World Trade matters there is, however, such a common policy, the Common Commercial Policy.¹¹⁶ This would continue to be the case in a post-Constitution EU, as under the draft constitution there is 'little containment of EU power' in 'the domain of exclusive external competence'¹¹⁷ under the now numbered Art.I-13(2).¹¹⁸

Addressing the current situation, Kuijper throws a spanner in the works by pointing out that the ECJ, in *Opinion 1/94*, does not use the term 'mixed competence' (competence mixed), but 'joint competence' (competence partagée).¹¹⁹ He goes on to say that the drawing of sharp distinctions between EC and member state competence may not be 'helpful' in addressing issues 'involving the management of the WTO Agreement' and in issues of 'cross retaliation', adding that the duty to co-operate between the EC and its member states on this point is more important.¹²⁰ This argument could still be made with regard to a post-Constitution situation, even if it is found that the line between exclusive and shared competence has been shifted somewhat under the proposed treaty. Should the issue of WTO obligations by the EC and its member states be relegated to the area of joint or shared competence under EC jurisprudence, then we enter another very difficult area of EC law, that of subsidiarity.¹²¹

6.2. *The Issue of Subsidiarity*

Cottier sees the relegating of the issue of WTO competence within the EC to an issue of subsidiarity between the EC and its member states as strength from the point of view of the 'internal power relations' within the EC.¹²² He does,

114. At [1978] SEW 276.

115. Op. cit. note 104.

116. Art. 133 EC, recently amended by the Nice Treaty, and to be incorporated into Art. III-315 of the draft European Constitution (after signature).

117. Op. cit. note 108.

118. Art. I-13(2) provides that the Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, is necessary to enable it to exercise its internal competence, or affects an internal Union act.

119. Op. cit. note 33.

120. Ibid.

121. Art. 3B pre Amsterdam, which provides that: 'the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.'

122. Thomas Cottier, *Dispute Settlement in the World Trade Organization; characteristics and structural implications for the European Union*, CMLRev. 35, 325-378, 1998.

however, admit that from an external perspective, this approach 'hardly reinforces the position of Europe in relations with other Members of the WTO, in particular the United States'.¹²³ Cottier also highlights the issue of differentiating 'law-making' and 'law-applying' case law, and he advocates the politically pragmatic, though legally less satisfying, approach of 'team-work' between the Commission and the national administrations concerned in WTO disputes.¹²⁴

The draft European Convention deals with the issue of subsidiarity in the post signature Article I-11 with a protocol attached to the draft Constitution.¹²⁵ Article I-11 refers to the principle of conferral being the governing principle of the limits of the Union's competences with 'the use of the Union's competences' to be 'governed by the principles of subsidiarity and proportionality'. While both subsidiarity and proportionality are familiar concepts, the conferral principle, despite the new name, also appears to offer little that is new to the analysis of the law in this area. Much of Article I-11 looks familiar, although the reference to whether an action can be sufficiently achieved by a Member State, in paragraph 3 of this article, refers to 'either at central level or at regional and local level', adds a new layer of governance for the post-Constitution EU principle of subsidiarity. The protocol on the application of the principles of subsidiarity and proportionality builds on the principles provided for in earlier EC/EU documentation,¹²⁶ providing for procedural mechanisms for the operation of the principle. As stated by Craig, however, 'it remains to be seen how subsidiarity and the Protocol operate in practice'.¹²⁷

6.3. The Political Dimension

From a first reading, therefore, of the draft Constitution it would appear that clarity cannot be brought to the EC-WTO legal nexus to be adjudicated on a post-*Biret* case. The political aspect of a post-*Biret* judgment is therefore thrown into sharp relief. It is clear to Cottier that 'non-compliance [with WTO law] may even threaten the consistency of the Union's legal order',¹²⁸ and with it the concept of the supremacy of Community law. This would put in jeopardy the 'imperfect constitutional structure' of the EC referred to in the introduction to this article and as recognised in the draft European Constitution. Cottier points out that the supremacy of EC law depends on 'legitimacy and persuasion', with legal provisions which are 'inconsistent with international obligations' putting this in jeopardy.¹²⁹ Legitimacy of persuasion could

123. Ibid.

124. Ibid.

125. Protocol on the Application of the Principles of Subsidiarity and Proportionality.

126. Op. cit. note 108.

127. Ibid.

128. Op. cit. note 122.

129. Ibid.

also be jeopardised in light of Rosa's view, referred to earlier, that the lack of democratic accountability of WTO bodies and the need to 'strike a balance between trade and societal values' has also to be added to the political mix.¹³⁰ This then has to be juxtaposed against Zonnekeyn's point that failure to grant WTO law direct effect within the EC legal jurisdiction in order to grant the EC negotiators at the WTO room for manoeuvre in future negotiations is an assault on the trias political principle and is based on political reasoning by the ECJ, rather than legal reasoning. Kuijper's argument on the duty to co-operate between the EC and its member states,¹³¹ discussed earlier in the context of exclusive competence, continues on this theme. Cottier, advocating team work between the EC and its member states with regard to WTO commitments, reflects this politically pragmatic, rather than strictly legal, allocation of obligations. In addition, non-compliance by the EC or part of the EC with WTO commitments would lose credibility of other WTO member states in the EC, and would lose the EC international market access rights.¹³² This academic analysis is reflected in the ECJ's reasoning in *Portugal v. Council* and in the AG's opinion in *Biret*, with regard to WTO obligation which had not been adjudicated upon by the DSB.

7. Conclusion

The above points highlight some problematic issues from a legal perspective, which resolve themselves to relative clarity when examined from a political perspective. The response of the ECJ following what appears to be political reasoning rather than pure legal reasoning, as to the legal effect of WTO law within the EC jurisdiction. It gives rise to a question as to the exact balance of powers between the EC and its member states in the context of the EC's relationship with the WTO and, in this context, the relative role of the EC institutions within the EC jurisdiction and the role that the ECJ has developed for itself within the EC. While the EC is clearly set up to run on the basis of the rule of law, the issue does arise whether the ECJ should ignore the 'unanimous position of the Governments' of the EC vis-à-vis the World Trade Organisation.¹³³ As stated in one Common Market Law Review editorial, the balance is between the ECJ acceding to governments' demands pursuant to pressure 'from weak industries defending their own short term interests' or should the ECJ protect the interests of EC consumers and the EC's own interests by 'granting direct effect of what was then GATT 47 obligations

130. Op. cit. note 24.

131. Op. cit. note 33.

132. Op. cit. note 122.

133. 'Editorial Comment, Strengthening GATT', CMLRev. 1983, p. 393.

'against the wishes of the Governments'.¹³⁴ As pointed out in the same editorial, 'the Court cannot govern Europe',¹³⁵ despite the highly political role that it has been asked to play in the context of the legal relationship between the EC jurisdiction and the WTO jurisdiction. The ECJ, may, however, be faced with this role, in the absence of clearer direction from the treaties, in our 'post-Biret' case.

Some writers would argue that the ECJ has not been shy of developing law when it felt the need to do so, as in the development of the Treaty of Rome itself, converting a traditional multilateral treaty¹³⁶ into a constitutional charter governed by a form of constitutional law.¹³⁷ However, as Mancini pointed out, the ECJ 'would have been far less successful had it not been assisted by two mighty allies: the national courts and the Commission'.¹³⁸ On the issue of GATT and WTO, when the issue comes before the ECJ, 'even the Commission [pleaded] against applying the international rules within the Community legal order'.¹³⁹

Perhaps a more effective analysis can be made of the situation when, unlike with many other international legal obligations entered into by the EC, the WTO and before it GATT 47 do have within them very effective dispute resolution mechanisms. The issue of the EC and the ECJ's relationship with other international tribunals has caused problems for the ECJ in other instances. This issue is brought to the fore by Usher, who points out that this issue of possible overlapping jurisdictions with international tribunals 'has arisen in a number of requests under Article 300 for an Opinion'.¹⁴⁰ He goes on to point out that in *Opinion 1/91*, which dealt with the creation of an EEA Court, the ECJ, in defence of its own prerogatives, held that 'to confer 'jurisdiction' on the EEA Court was incompatible with Community law'.¹⁴¹ This is in line with the observation that the ECJ has shown itself to be hostile 'to the creation of, or accession to, other international tribunals with overlapping jurisdiction or membership'.¹⁴² While the ECJ has exercised an ability to be both restrictive and developmental in its interpretation of the EC treaty, it is most activist in its efforts to ensure the uniform control of the validity of

134. Ibid.

135. Ibid.

136. G. Federico Mancini, 'The Making of a Constitution for Europe', CMLRev. 1989, p. 595.

137. J.H.H. Weiler, 'The Reformation of European Constitutionalism', JCMS, Vol. 35, No. 1, p. 97.

138. Op. cit. note 134.

139. Op. cit. note 133.

140. John Usher, 'The Assertion of Jurisdiction by the European Court of Justice', Ch 14 in Patrick Capps, Malcolm Evans and Strados Konstantinidis, *Asserting Jurisdiction, International and European Legal Perspective*, Hart Publishing, 2003, ISBN 1-84113-305-1.

141. Ibid.

142. Ibid.

Community acts and the exercising of judicial control over the activities of the EC bodies in the context of the legal process.¹⁴³ It is perhaps somewhat naive to expect the ECJ to exercise its activist abilities at its own expense, in the defence of law of another organisation, merely for the sake of the discipline itself.

The WTO legal jurisdiction will develop with time, both as a consequence of further panel and appellate body reports at the WTO, and further rounds of multilateral trade negotiations. The competing pulls of EC law and WTO law, with its interdependent and reflexive relationship, with the development of 'new and endemic boundary clashes' between these two polities leading to, as suggested by Walker, a transformation of mutual self understanding.¹⁴⁴ This contentious evolution is in line with constitutional lawyers' pluralistic thinking which emphasise 'the possibility of constitutional collision between high judicial authorities of different polities as the major point of contestation and crucial axis of rational authority'.¹⁴⁵ In the meantime the EC Commercial lawyer, working with the 'dynamic and evolutionary character of the CCP'¹⁴⁶ is left with an imperfect, but perhaps evolving, situation in the absence of the direct effect of WTO law within the EC. These issues will increasingly require attention in the forthcoming years, in the absence of amendments to the draft Constitution for Europe prior to enactment, then by way of further developments of ECJ jurisprudence.

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143. Ibid.

144. Neil Walker (ed.) *Sovereignty in Transition*, Oxford, Portland, Oregon, 2003, ISBN 1-84113-337-X (Hbk), Ch 1 Neil Walker, *Late Sovereignty in the European Union*.

145. Ibid.

146. Jacques H.J. Burgeois, 'The Uruguay Round of GATT: Some General Comments from an EC Standpoint', Ch 6 in Emiliou and O'Keeffe, *The European Union and World Trade Law after the GATT Uruguay Round*, John Wiley and Sons, 1996.

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Agricultural Commodities: Fortress Europe after Doha?

MARIA O NEILL*

Introduction

It has been well established and commented on by various authors that accession to the World Trade Organisation (WTO) by the European Community (EC) has had and will continue to have a profound impact on the operation of the EC's Common Agricultural Policy (CAP). Equally affected were the rules operated by the EC concerning the importation and exportation of agricultural commodities. With the resumption of the Millennium Round of negotiations a re-examination of this latter issue is merited, with a view to establishing not just changes to date, but also to anticipate possible future developments in this area. This paper proposes to examine this latter issue, taking as its definition of agricultural commodities that used by the WTO Agreement on Agriculture,¹ which is narrower than that used by the EC Common Agricultural Policy.

The EC's ability to enter into international trade agreements is provided for by Article 133 (ex Article 113) EC (Treaty of Rome as amended).² This forms the lynch pin of the EC's Common Commercial Policy (CCP),³ also known as the 'external

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¹ The WTO Agreement on Agriculture specifies the commodities that it covers in its Annex 1. These are known as Harmonised System (HS) Chapters 1–24 less fish and fish products (plus specific named commodities). The reference to HS is the Harmonised System of Classification under the International Convention on the Harmonized Commodity Description and Coding System, of the World Customs Organisation.

² Art 133 (ex Art 113) EC 1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. 2. The Commission shall submit proposals to the Council for implementing the common commercial policy. 3. Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The relevant provisions of Art 300 shall apply. 4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority. 5. The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on services and intellectual property insofar as they are not covered by these paragraphs.

³ Art 131 (ex Art 110) EC to Art 134 (ex Art 115) EC.

economic policy'.⁴ Not only was the article renumbered by the Amsterdam Treaty, but a new provision, Article 133.5 was added. With the coming into force of the Nice Treaty⁵ a new Article 133 was inserted into the EC treaty, which, inter alia, extended the provisions of Article 133 EC to cover certain areas covered by the WTO General Agreement on Trade in Services (GATS)⁶ and Trade Related aspects of Intellectual Property (TRIPs)⁷ agreements. The Amsterdam change was described by the Commission as not being "an extension of the existing CCP provisions, but merely a codification of the current position" and case law to date.⁸ The Nice changes could, however, be deemed to be an extension of the Article 133 competence. This article was originally complemented by Article 116 EC,⁹ now repealed, and is currently complemented by Article 19(1) (ex. J.9) Treaty on European Union, as amended (EU).¹⁰ As its provisions are currently drafted, Article 133 gives "an unusual amount of discretion"¹¹ to the "Council, acting on a proposal from the Commission, and after consulting the European Parliament"¹² as to the development and expansion of the CCP, to include "both the form and the content" of this policy.¹³

The ECJ in *Opinion 1/94*¹⁴ referred to "the exclusive competence conferred on the community" regarding the CCP by Article 133 EC.¹⁵ Despite the ECJ's finding in *Opinion 1/94* that only "in so far as rules have been established at internal level does the external competence of the Community become exclusive", as pointed out by Marise Cremona, "the Community's CCP powers have been held to be exclusive" to the EC, with, even in the absence of regulation by the EC, requiring an EC Member State to obtain authorisation for their own developments in this policy area.¹⁶

⁴ M Cremona 'EC External Commercial Policy after Amsterdam: Authority and Interpretation with Interconnected Legal Orders' in JHH Weiler (ed) *The EC, the WTO and the NAFTA: Towards a Common Law of International Trade* (Oxford University Press 2000).

⁵ Signed 26 Feb 2001, in force from 1 Feb 2003.

⁶ General Agreement on Trade in Services (15 Apr 1994).

⁷ Trade Related Aspects of Intellectual Property (15 Apr 1994).

⁸ M Cremona (n 4).

⁹ Ex Art 116 EEC "From the end of the transitional period onwards; Member States shall, in respect of all matters of particular interest to the common market, proceed within the framework of international organisations of an economic character only by common action. To this end, the Commission shall submit to the Council, which shall act by a qualified majority, proposals concerning the scope and implementation of such common action. During the transitional period, Member States shall consult each other for the purpose of concerting the action they take and adopting as far as possible a uniform attitude."

¹⁰ Art 19.1 EC (ex Art J.9) Member States shall co-ordinate their action in international organisations and at international conferences. They shall uphold the common positions in such for a. In international organisations and at international conferences where not all the Member States participate, those which do take part shall uphold the common positions.

¹¹ M Cremona (n 4).

¹² Art 133.5 EC.

¹³ M Cremona (n 4).

¹⁴ *Opinion 1/94 (Re the Uruguay Round Treaties)* [1994] ECR 5267.

¹⁵ M. Cremona (n 4).

¹⁶ *Ibid.*

This situation is reflected in the WTO case of *European Communities - Customs Classification of Certain Computer Equipment*,¹⁷ also known as the *LAN* case. In this case the United States “tried to bring a complaint against Ireland and the United Kingdom” (while agreeing to bring a complaint against the EC as well).¹⁸ As can be seen above, the report, the conclusions and recommendations referred only to the EC. The case concerned the customs classifications utilised by the Irish and British authorities. The Appellate Body noted that the “EC constitutes a customs union and that the “export market” is the European Communities, not an individual Member State”.¹⁹ This approach has been bolstered by the European Commission’s view in the areas of shared competence, such as GATS and TRIPs, that “in the absence of any division of competences between the EU and its Member States, the EU bears international responsibility for the fulfilment of the entire GATS and TRIPs agreements,” and therefore should always be named as a defendant in a WTO case against an individual Member State of the EC.²⁰ This is also reflected in the internal case law of the EC, in the opinion of Advocate General (AG) Tesaurò in *Hermès*,²¹ and appears now to be reflected in WTO practice.²² The relationship between the Member States of the EC and the EC in the areas of GATS and TRIPs are further clarified and extended by the Nice amendments to Article 133 EC.

The exact delimitation of the EC’s CCP under Article 133 EC, post Amsterdam, pre-Nice, with the use of the “technique of delegation of the decision to a future Council of Ministers”²³ was in need of clarification. The same situation pertains with regard to the post Nice situation. This arises from the drafting of the Article 133 EC provisions, and the possibility of its future extension with the article not “specifying on what basis that decision should be made, or indeed whether a newly extended commercial policy should possess all the characteristics (such as exclusivity) of the existing policy.”²⁴ This continues to be the case post-Nice regarding intellectual property provisions, pursuant to Article 133.7 EC, and to the non-Article 133.6 GATS matters. In addition a horizontal agreement has yet to be agreed to dealing with the areas of competence to be shared between the EC and its Member States in the areas of services and intellectual property, however, in the interim it would appear that the occupied field theory would apply.

¹⁷ *European Communities - Customs Classification of Certain Computer Equipment* Report of the Appellate Body (5 June 1998) WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R).

¹⁸ A Rosas ‘Joinder of Parties and Third Party Intervention in WTO Dispute Settlement’ in Friedl Weiss (ed) *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the practice of Other International Courts & Tribunals* (Cameron May London 2000).

¹⁹ Ibid.

²⁰ Ibid.

²¹ Case C-53/96 *Hermès International/ FHT Marketing Choice BV*, [1998] ECR 3603.

²² M Cremona (n 4).

²³ Ibid.

²⁴ Ibid.

Agricultural Aspects of the CCP

Long before the emergence of the WTO the interaction of the internal commercial policy of the EC and the CAP was examined in the *Ramel Cases* in 1977.²⁵ In that case it was held at point 19 of the judgement that "the objectives of free movement and of the common agricultural policy should not be set one against the other nor in order of precedence but on the contrary combined and the principle of free movement should prevail save when the special requirements of the agricultural sector call for adaptations." This would reflect the provisions of the then Article 38(2) EC, now Article 32(2) EC, which provides that; "Save as otherwise provided in Articles 33 to 38, the rules laid down for the establishment of the common market", namely in this case, Article 133 (ex Article 113 EC), "shall apply to agricultural products".

The operation of the CAP's common organisation exceptions to the CCP provisions were explained by the ECJ in *Ramel* on the basis that "many mechanisms of the organization of the market, such as price fixing and intervention systems, by organizing and regulating trade involve limitations on free movement and such limitations are not therefore of a temporary nature or justified by exceptional circumstances but are characteristic of the common agricultural policy".²⁶ Therefore the interference of the free movement provisions imposed by the community in pursuance of a common organisation would be "acceptable" despite the fact that "they interfere with the free flow of goods between Member States and distort competition in the Common Market".²⁷ Therefore to the extent that the internal CAP treaty provisions do not expressly require a distortion of the application of the CCP's application to trade within the EC in Agricultural goods, then trade in agricultural goods within the EC in agricultural goods is to be determined by the now numbered Article 133 EC. Equally, under the doctrine of parallel powers, as developed earlier, and as dealt with in *Opinion 1/94*, then the EC under Article 133 EC has exclusive competence to negotiate externally on the international trade in agricultural goods. This issue was dealt with in paragraphs 29 to 33 of *Opinion 1/94*. There the ECJ expressed the opinion that despite the fact that the then Article 43, now Article 37 EC, had been held in the case of *EC Commission v EC Council*,²⁸ as being the appropriate legal basis for not only "intra-community trade but also when they originate from non-Member States",²⁹ that the signing of the WTO Agreement on Agriculture fell into a different category. As the WTO document intended to

²⁵ Joined Cases 80 and 81/77, *Societe Les Commissionnaires Reunis SARL v Receveur des douanes SARL Les fils de Henri Ramel v Receveur des douanes*, 20 Apr 1978 [1978] ECR 927.

²⁶ Ibid at point 18 of the judgment.

²⁷ J McMahon *Law of the Common Agricultural Policy* (Pearson Education 2000).

²⁸ C-131/87, *EC Commission v EC Council* [1989] 1 ECR 3764, [1991] 1 CMLR 780, para 27.

²⁹ *Opinion 1/94 (Re the Uruguay Round Treaties)* [1994] ECR 5267, at para 29 of the ECJ's Opinion.

"establish on a worldwide basis 'a fair and marked-orientated agricultural trading system'" then the appropriate EC legal basis for signing the WTO Agreement on Agriculture was the then Article 113, now 133 EC.³⁰

Two further agricultural relevant WTO agreements were also addressed by *Opinion 1/94*, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), and the Agreement on the Technical Barriers to Trade (TBT). The ECJ held that the SPS agreement could be concluded "on the basis of Article 133 alone",³¹ and that the TBT agreement also fell "within the ambit of the Common Commercial Policy".³² The impact of this decision has had a profound effect on the EC's CAP, but also the focus of this paper,³³ on the import and export regulations of the EC for Agricultural Commodities.

The Agreements

Generalised Systems of Preferences

The European Economic Community (EEC) Member States had operated a generalised system of preferences (GSP) for lesser developed countries (Ldc) since the break up of their respective empires. The third countries within the EEC GSP scheme usually had colonial links with the EEC Member States. A global system of generalised preferences was sponsored by the United Nations Conference on Trade and Development (UNCTAD)³⁴ (UNCTAD I) from 1964, whose objective was "to increase export earnings, promote industrialisation and accelerate the rates of economic growth of developing - country beneficiaries".³⁵ These preferences were to be operated in favour of the Ldcs by the developed countries, without any reciprocity by the Ldcs in favour of the developed countries. The UNCTAD GSP built on pre-existing GSP systems operated by most developed countries, with the exception of the United States, but developed a new global, non-discriminatory system

³⁰ Ibid, quoting from the preamble to the WTO Agreement on Agriculture.

³¹ *Opinion 1/94 (Re the Uruguay Round Treaties)* [1994] ECR 5267, at para 31.

³² *Opinion 1/94 (Re the Uruguay Round Treaties)* [1994] ECR 5267, at para 33.

³³ See further M O'Neill 'The winds of change blow again: the World Trade Organisation's impact on the European Community's Common Agricultural Policy' (2002) 24:3 *Liv L R* 181-208.

³⁴ "One of the principal functions of UNCTAD was to 'formulate principles and policies on international trade and related problems of economic development' and to 'make proposals for putting the said principles and policies into effect'" General Assembly Resolution 1955 (XIX), Proceedings of UNCTAD II, UN, New York (1968), vol 1, report and Annexes, at 4, quoted in JM McMahon *Agricultural Trade, Protectionism and the Problems of Development* (Leicester University Press 1992).

³⁵ Resolution 21(II), UNCTAD II, vol 1, proceedings and report, UN, New York, (1968), at 38, quoted in JM McMahon *Agricultural Trade, Protectionism and the Problems of Development* (Leicester University Press 1992).

"to be offered to all Idcs without discrimination, and were not to be reciprocated by the Idcs."³⁶ This system was to operate in contradiction to the basic principle of MFN³⁷ of the pre-existing GATT 47. The GATT Tokyo Round addressed the issue of the UNCTAD GSP, which, although far from perfect in its operation, was facilitated by an enabling clause,³⁸ which called for "developing countries to make contributions or concessions as their economies develop and improve".³⁹ UNCTAD III,⁴⁰ held in 1972, called for the GSP to be extended to include "processed and semi-processed agricultural and primary products in Chapters 1–24 of the Brussels Tariff Nomenclature⁴¹ (BTN)".⁴² The Brussels Tariff Nomenclature was replaced by the Harmonised Commodity Description and Coding System (HS) of the World Customs Organisation (WCO), on the 1st January 1988, of which more later in this article.

The EEC adopted the GSP on the 1st July 1971,⁴³ before the GATT waiver had been obtained.⁴⁴ It is generally considered that the countries trading with the EC on the basis solely of the GSP, are only in a preferential situation to those countries which trade with the EC on the basis of the general provisions of "most favoured nation" basis, which operates under the GATT. Traditionally 59 signatories to the Lomé Convention were in a better position, however Lomé has now been replaced by Cotonou, of which more later in this article. In the non-agricultural goods sector, even the European Free Trade Association (EFTA) countries are in a better position than the GSP countries,⁴⁵ as are the dependent territories of the EC Member States, the new applicants for membership, and the Maghreb and Mashreq countries of the Euro-Mediterranean Partnership, and "other Mediterranean countries with special preferential trade agreements".⁴⁶ In contrast to the Yaoundé and Lomé Conventions, the EC's GSP is unilateral, with "no contractual commitment" being made by

³⁶ A Weston, V Cable and A Hewitt *The EEC's Generalised System of Preferences, Evaluation and Recommendations*, (Overseas Development Institute UK 1980).

³⁷ Most Favoured Nation.

³⁸ BISD 26th Supplement (1980) 203, at 205. See further Annex 1 to this chapter. The provisions of this Enabling Clause were echoed at the Uruguay Round declaration at BISD 33rd Supplement (1987) 19-27, at 21.

³⁹ J McMahon *Agricultural Trade, Protectionism and the Problems of Development* (Leicester University Press 1992).

⁴⁰ Resolution 77 (III) of Proceedings of UNCTAD III, vol 1, *Proceedings*, UN, New York, (1972) 85-86.

⁴¹ Further the to the Nomenclature Convention of Brussels of 15 Dec 1950, adopted into EC law by way of Council Regulation 950/68 of 28 June 1968 [1968] OJ Spec Ed (I) 275, together with the Annex attached thereto.

⁴² J McMahon (n 39).

⁴³ Inter alia, Règlement (CEE) n° 309/71 du Conseil, 21 juin 1971, portant ouverture de préférences tarifaires pour certains produits originaires de pays en voie de développement, OJ (1971) L 142.

⁴⁴ J McMahon (n 39).

⁴⁵ Ibid.

⁴⁶ A Weston, V Cable and A Hewitt (n 36).

either the EC or any other GSP donor to "maintain preferences and market access to ldfs".⁴⁷

Unlike the pre-WTO system, where GSP schemes operated differently for "industrial products, textiles, ECSC products and agricultural products,"⁴⁸ the post-WTO EC GSP⁴⁹ is based on two articles, one, dealing with industrial goods,⁵⁰ and the other with agricultural goods.⁵¹ The differentiation for agricultural products arises from the objective of the GSP to industrialise developing countries, and from protectionist nature of the EC's CAP.⁵² The main intention of the changes to the EC's GSP was the "complete abolition of tariff quotas and tariff ceilings",⁵³ with the regulation⁵⁴ creating a structure of four levels of tariff reductions.⁵⁵ The Council retained the ability to re-impose MFN tariffs "in exceptional circumstances" under Article 14, Regulation 3281/94.⁵⁶ More Southern African products were included with partial graduation, out of the GSP system, back to the general MFN system, was introduced for wealthier developing countries.⁵⁷

One of the other main changes to the EC's GSP is the change to the EC's GSP's rules of origin. While the rules remain substantially the same for the poorest States, amendments to the EC's Common Custom's Code (CCC)⁵⁸ resulted in addition to "donor-country" cumulation being permitted in limited regional groupings, a "gen-

⁴⁷ Ibid.

⁴⁸ P Waer and B Driessen 'The New European Union Generalised System of Preferences A Workable Compromise in the EU - but a Better deal for Developing Countries?' (1995) 29(4) JW.T, 97-124.

⁴⁹ Relying on Art 133, (ex Art 113) EC.

⁵⁰ Council Regulation (EC) No 3281/94, 19 Dec 1994, applying a four-year scheme of generalised tariff preferences (1995 to 1988) in respect of certain industrial products originating in developing countries, tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries, OJ (1994) L348/1, corrigendum of 12 Apr 1995 in OJ (1995) L 82/29.

⁵¹ Council Regulation (EC) No 3282/94, 19 Dec 1994, extending into 1995 the application of regulations (EEC) N 3833/90, (EEC) No 3835/90 and (EEC) No 3900/91 applying generalised tariff preferences in respect of certain agricultural products originating in developing countries. OJ (1994) L 348/57.

⁵² P Waer and B Driessen (n 48).

⁵³ S Peers 'Reform of the European Community's Generalized System of Preferences' (1995) 29(6) JWT 79-96.

⁵⁴ Art 2, Regulation 3281/94, referring to Annex 1, parts 1-4. Some products were excluded from receiving any benefits at all under Art 1(2), Regulation 3281/94, referring to Annex IX. These products included a number of primary products, as well as certain glue, leather, steel, aluminium and lead products, and some other metals. S Peers 'Reform of the European Community's Generalized System of Preferences' (1995) 29(6) JWT 79-96.

⁵⁵ 15, 30, 65 and 100 per cent.

⁵⁶ S Peers (n 53).

⁵⁷ Ibid.

⁵⁸ The EC's Common Customs Code was set out in Council Regulation (EEC) No 2913/92 of 12 Oct 1992 establishing the Community Customs Code, Official Journal L 302, 19/10/1992 at 1, and implemented by Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, Official Journal L 253, 11/10/1993 at 1 The amendments allowing for "donor country cumulation was set out in Art 72 of Regulation 2454/93, which was added by Regulation 3254/94, Commission Regulation

eral tolerance for all third-country materials" of up to a maximum of 5 per cent of ex-works value was introduced, with textiles and clothing being excluded from this rule.⁵⁹ A new Management Committee for EC GSP day-to-day issues was also set up.⁶⁰

At the time of reform proposals (1990) a document issued from Vice-President Manuel Marín, which became known as the Marín Memorandum. This document suggested a scheme for extending the general GSP benefits for specific countries, which met particular requirements. These requirements included the complying with a social clause, for an ldc to comply with the provisions of Conventions no 87⁶¹ and 98⁶² of the International Labour Organization, an environmental clause, requiring compliance with the criteria of the International Tropical Timber Organization, and the International Monetary Fund criteria, and a drugs provision, for countries, such as those in the Andean Pact and the Central American countries, who wanted "help in the fight against drugs".⁶³ These provisions were brought in, for both agricultural goods and non-agricultural goods by Council Regulation 1154/98,⁶⁴ and were further elaborated on in Council Regulation 2820/98.^{65, 66} The regulation currently in force for all goods except armaments, is Council Regulation (EC) No. 2501/2001.⁶⁷ As stated by Peers, in the absence of a WTO/GATT GSP code, with the backing of

(EC) No 3254/94 of 19 Dec 1994 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community customs code, Official Journal L 346, 31/12/1994 at 1, which provides, *inter alia*, Art 72 1. Notwithstanding the provisions of Art 69, non-originating materials may be used in the manufacture of a given product, provided their total value does not exceed 5 per cent of the ex-works price of the final product and subject to the conditions laid down in Note 3.4 in Annex 14.

2. Para 1 shall not apply to products falling within Chapters 50 to 63 of the Harmonized System.

⁵⁹ S Peers (n 53).

⁶⁰ Arts 17-19, Council Regulation (EC) No 3281/94, 19 Dec 1994, applying a four-year scheme of generalised tariff preferences (1995 to 1988) in respect of certain industrial products originating in developing countries, tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries, OJ (1994) L348/1, corrigendum of 12 Apr 1995 in OJ (1995) L 82/29.

⁶¹ C87: Freedom of Association and Protection of the Right to Organise Convention, 1948 (9/7/1948) <http://www.ilo.org>.

⁶² C98: Right to Organise and Collective Bargaining Convention, 1949 (1/7/49) <http://www.ilo.org>.

⁶³ P Waer and B Driessen (n 48).

⁶⁴ Council Regulation (EC) No 1154/98 of 25 May 1998 applying the special incentive arrangements concerning labour rights and environmental protection provided for in Arts 7 and 8 of Regulations (EC) No 3281/94 and (EC) No 1256/96 applying multiannual schemes of generalised tariff preferences in respect of certain industrial and agricultural products originating in developing countries Official Journal L 160, 04/06/1998 at 1.

⁶⁵ Council Regulation (EC) No 2820/98 of 21 Dec 1998 applying a multiannual scheme of generalised tariff preferences for the period 1 July 1999 to 31 Dec 2001, Official Journal L 357, 30/12/1998 at 1.

⁶⁶ P Waer and B Driessen (n 48).

⁶⁷ Council Regulation (EC) No 2501/2001 of 10 Dec 2001 applying a scheme of generalised tariff preferences for the period from 1 Jan 2002 to 31 Dec 2004, 31/12/2001, OJ L346/1.

the WTO's Dispute Settlement mechanism, beneficiaries under a GSP system "may increasingly find that their benefits come with a price."⁶⁸ This is no doubt an area where at least an attempt will be made to resolve this issue during the Millennium round negotiation.

Lomé/Cotonou

The conclusion of the Yaoundé convention coincided with the development of the CAP, which had an impact on the Yaoundé provisions for agricultural products. Initially only rice importation from the AASM⁶⁹ countries was affected, but by Yaoundé II⁷⁰ (1969)⁷¹ agricultural imports were gaining greater preference in accessing the EEC market than non-Yaoundé countries⁷² but were otherwise encountering barriers set up to protect the CAP. Free trade prevailed for industrial products from 1957, however the position regarding agricultural imports weakened with regard to "the level of preference given"⁷³ over a period of time.⁷⁴ When the UK joined the EEC in 1973 it brought its traditional trading relations with its former colonies into the AASM framework, the new group of new and emerging countries being now referred to as the Afro-Caribbean-Pacific Countries (ACP),⁷⁵ with the treaties now being referred to as the Lomé Conventions. While the ACP countries were given preferences greater than the GSP countries, these preferences were weakening with time, with the progressive liberation of trade under GATT 1947, and the MFN concessions under GATT.

In addition, unlike the GSP system, whose focus, as referred to above, is the industrialisation of developing countries, and whose drafting was affected by a protectionist approach to the developing CAP,⁷⁶ with limited agricultural product coverage,⁷⁷ and different GSP schemes for agricultural and non-agricultural products,⁷⁸ the Lomé conventions were more agricultural in orientation. While GSP countries were developing their industrial commodity preferences, the ACP countries exported "hardly

⁶⁸ S Peers (n 53).

⁶⁹ The Association of African States and Madagascar.

⁷⁰ 1969.

⁷¹ Art 2(2) Yaoundé II OJ 1970 L 282/2.

⁷² J McMahon "The Renegotiation of Lomé: inventing the future?" (1989) 14 ELRev 140.

⁷³ Ibid.

⁷⁴ By virtue of Art "(2) of the convention, agricultural products were excluded from the general trade obligation of abolishing customs duties, quantitative restrictions and all measures having similar effects (JO 1970 L282/2)". J McMahon "The Renegotiation of Lomé: inventing the future?" (1989) 14 ELRev 140.

⁷⁵ <http://www.acpsec.org/>.

⁷⁶ P Waer and B Driessen (n 48).

⁷⁷ J McMahon (n 39).

⁷⁸ P Waer and B Driessen (n 48).

any manufactures"⁷⁹ made greater use of their more liberal preferences for agricultural products.⁸⁰

The issue of whether the Yaoundé and Lomé preferences were GATT compatible have been an issue "since the beginning of the development co-operation".⁸¹ This issue came to the fore with regard to the commodity of Bananas. Lomé IV, which "guarantees... duty-free imports into the Community subject to certain reserves" used to protect the CAP, has attached to it a Banana Protocol, which guaranteed "a market for ACP States' bananas",⁸² with a Common Organisation of the Market in Bananas⁸³ being set up.⁸⁴ These provisions were highly controversial and culminated, within the EC, in the ECJ case of *Commission v Council*⁸⁵ with the German, Belgian and Dutch governments challenging this provision on the basis that it breached GATT 1947 rules. The ECJ in this case confirmed that GATT 1947 was an "integral part of the Community's legal order," with the ECJ being competent to interpret the provisions of GATT. However, the ECJ also held that GATT could not be "a criterion for the examination of the legality of community acts".⁸⁶ These particular provisions were subsequently challenged at the WTO level,⁸⁷ and were found⁸⁸ to be in breach of GATT provisions. The WTO finding, eventually, led to the redrafting of the ACP relationship, which resulted in the Cotonou Agreement of 2000.

The agreement currently in force is the aforementioned Cotonou Agreement. This agreement is based on a five pillar framework, to include, a political dimension, participation, focus on poverty reduction, financial co-operation, with funding from the European Development Fund and the European Investment Bank, a new framework for economic and trade co-operation. The Cotonou, unlike its predecessors, has been drafted so that its trade provisions are fully in conformity with the WTO provisions.

⁷⁹ A Weston, V Cable and A Hewitt (n 36).

⁸⁰ J McMahon (n 39).

⁸¹ J McMahon (n 72).

⁸² Ibid.

⁸³ The Common Organization of the Market in Bananas Council Regulation No 404/93 of 13 Feb. 1993 on the Common Organization of the Market in Bananas, OJ 1993 L 47/1.

⁸⁴ U Everling 'Will Europe slip on Bananas? The Bananas judgment of the Court of Justice and National Courts' (1996) 33(3) CML Rev 401-437.

⁸⁵ Case 45/86, *Commission v Council* [1987] ECR 1493.

⁸⁶ U Everling (n 84).

⁸⁷ *European Communities – Regime for the Importation, Sale and Distribution of Bananas, complaints by Ecuador, Guatemala, Honduras, Mexico and the United States – Report of the Panel* (22 May 1997) WT/DS27/R/ECU.

⁸⁸ *European Communities – Regime for the Importation, Sale and Distribution of Bananas, complaints by Ecuador, Guatemala, Honduras, Mexico and the United States – Report of the Appellate Body* (9 Sept 1997), WT/DS27/AB/R, confirming the Panel's view.

The Euro-Mediterranean Agreements

Another set of agreements relevant to this discussion are the Euro-Mediterranean agreements. These agreements hold out no prospect of membership of the EC/EU,⁸⁹ (except in the case of Cyprus and Malta) but rather the EC hopes to improve the wealth and stability (economic and political) of its southern borders, in order to "progressively (create) a zone of peace, stability and security in the Mediterranean".⁹⁰ The objective is to establish a Euro-Mediterranean Economic Area (EMEA) through meshing bi-lateral agreements⁹¹ between the EC and the countries of the Mahreb⁹² and the Mashreq.⁹³ This partnership is still under construction. In effect the Euro-Mediterranean Partnership is a partnership predominately trade related, but inspired by the EU's concerns as to the security of its borders, both from conflict and wars and from being subjected to an influx of economic and possibly illegal migrants.

The most developed relationship in this structure is the EC's agreement with Tunisia,⁹⁴ where the aim of free trade in goods is the most clearly thought out policy. Here the agreement regarding duties and charges having equivalent effect for industrial produce are set out in detail in Articles 6 to 14. This situation is further elaborated on by way of Decision No 1/1999 of the EU-Tunisia Association Council,⁹⁵ Article 9 of which provides that "products originating in Tunisia shall be imported into the community free of customs duties and charges having equivalent effect and without quantitative restrictions or measures having equivalent effect." This provision is to include "customs duties of a fiscal nature" under Article 13 of that decision. Goods imported into Tunisia from the EC are to benefit from the "progressive reduction of customs duties and charges having equivalent effect" over a period of 5 to 12 years, depending on the particular commodity.⁹⁶ Agricultural goods are however treated differently, with agricultural goods provisions to be applied to agricultural components "mutatis mutandis".⁹⁷ Agricultural goods are to benefit from a gradual implementation of "greater liberalisation of their reciprocal trade"

⁸⁹ Unlike the Europe Agreements with the Central and Eastern European Countries.

⁹⁰ Barcelona Declaration, adopted at the Euro-Mediterranean Conference, 27 and 28 Nov 1995.

⁹¹ To include agreements with Tunisia (July 1995), Israel (Nov 1995), Morocco (Feb 1995), the West Bank and the Gaza Strip (Feb 1997) and Jordan (Apr 1997), and the Customs Union signed with Turkey (6 Mar 1995).

⁹² Tunisia, Morocco, Algeria.

⁹³ Egypt, Lebanon, Israel, Jordan, Turkey, Cyprus, Malta, Syria, Palestinian Authority.

⁹⁴ Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, OJ L 97, 30/3/98, 2-189.

⁹⁵ Decision No 1/1999 of the EU-Tunisia Association Council of 25 Oct 1999 on the implementation of the provisions on processed agricultural products laid down in Art 10 of the Euro-Mediterranean Agreement establishing an association between the European communities and their Member States, of the one part, and the Republic of Tunisia, of the other part (1999/743/EC).

⁹⁶ Art 11 of Decision No 1/1999 of the EU-Tunisia Association Council of 25 Oct 1999.

⁹⁷ Art 10 of Decision No 1/1999 of the EU-Tunisia Association Council of 25 Oct 1999.

pursuant to Article 16, with differentiation of provisions being provided for different commodities under Article 17 of Decision no. 1/1999.

As the intention is to create a free trade area around the Mediterranean, permitted as an MFN exemption by Article XXIV.8 GATT 47 and 94, it should be noted that such an exemption does not permit differentiation between agricultural and non-agricultural goods. Clearly these agreements, in the sense that they differ in their treatment of agricultural and non-agricultural commodities, in a way which does not reflect the WTO approach to same, could be found to be in breach of the MFN and its exceptions, requirements under the WTO agreements. It will be interesting to see how this matter resolves itself in the future.

From a quick review of some of the EC agreements from the perspective of trade in agricultural commodities, it is clear that there remains a need for a WTO, or WTO sponsored GSP code, on the assumption that the UNCTAD philosophy behind the GSP system is going to be adopted in the current economic and political WTO climate. In the absence of such a code, the EC's current GSP system, for all the limited benefits which it brings to the GSP beneficiary countries. In addition, it would appear that the EC's Euro-Med agreements could also be found wanting if held up to the probing investigations of the WTO, should such a development occur. It can be clearly evidenced from the Lomé / Cotonou scenario that the EC has to ensure that its external trading relations are WTO compliant, and that should they be found wanting in this regard, that the EC could be on the losing end of a WTO panel or appellate body ruling, with the necessity to redraft its external treaty arrangements in a WTO compliant format.

The Legal Tools

Anti-Dumping provisions

Annexed to the Uruguay Round Final Act, in Annex 1, are two agreements, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, dealing with antidumping provisions, and the Agreement on Subsidies and Countervailing Measures. These provisions were implemented into EC law by Council Regulation 384/96 as amended,⁹⁸ and Council Regulation 2026/97,⁹⁹ as amended, respectively. Prior to the Uruguay Round texts the EC had maintained one scheme for both anti-dumping and countervailing duties. While anti-dumping

⁹⁸ Council Regulation 384/96, OJ 6.3.96 L56/1, as amended, by Council Regulation 2331/96, OJ 6.12.96 L317/1, and Council Regulation 905/98, OH 30.4.98, OJ 30.4.98, L128/18, replacing Council Regulation 3283/94 L349/1, 31.12.94 L349/1, as amended by Council Regulation 1251/95, OJ 2.6.95 L122/1., F Snyder *International Trade Law and Customs Law of the European Union*, (Butterworths 1998).

⁹⁹ See Council Regulation 2026/97, OJ 21/10.97 L288/1, replacing Council Regulation 3284/94, OJ 31.12.94 L349/22, as amended by Council Regulation 1252/95, OH 2.6.95 L122/2.

measures are intended to address the issue of "distortive effects which dumping practices by firms established in third countries in the community market", and countervailing measures are intended to address the issue of the distortive effects within the Community market of "unfair foreign government subsidisation",¹⁰⁰ the two new schemes do however overlap at times, with the main differences between the two being "respective rules on the calculation of the dumping margin and the countervailable subsidy margin".¹⁰¹ The impact of these provisions on agricultural trade is however limited by the provisions of Article 21 of the WTO Agreement on Agriculture, which provides that "the provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement",¹⁰² with the Agreement on Agriculture providing its own provisions which affect the impact of the general provisions on anti-dumping, countervailing measures, and export subsidies on global agricultural trade. The exact interaction between these two WTO provisions may however be an issue for the future, particularly in light of the expiration of Article 13 of the Agreement on Agriculture, known as the peace clause, which has recently expired, of which more later.

Export subsidies, for their part, are generally regarded as "one of the most disruptive elements in the operation of world markets",¹⁰³ and it is perhaps for that reason that they are covered by a number of articles in a number of the Uruguay Round agreements. The exact relationship between these provisions, however, merits examination. The WTO regulation of subsidies for export of agricultural products derive from two Uruguay Round documents, the Agreement on Agriculture, Article 8,¹⁰⁴ and the Agreement on Subsidies and Countervailing Measures, Article 3.1.¹⁰⁵ Added to the picture, as with anti-dumping provisions, is the expiration of Article 13 of the Agreement on Agriculture.

¹⁰⁰ F Snyder *International Trade Law and Customs Law of the European Union*, (Butterworths 1998)

¹⁰¹ *Ibid.*

¹⁰² Art 21 Agreement on Agriculture: 1. The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement. 2. The Annexes to this Agreement are hereby made an integral part of this Agreement.

¹⁰³ D Chambovey 'How the Expiry of the Peace Clause (Art 13 of the WTO Agreement on Agriculture) Might Alter Disciplines on Agricultural Subsidies in the WTO Framework' (2002) 36(2) *JWT* 302-352.

¹⁰⁴ Art 8 of the Agreement on Agriculture, which provides that "Each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule".

¹⁰⁵ Art 3.1 of the Agreement on Subsidies and Countervailing Measures. "Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Art 1, shall be prohibited:

(a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods."

With specific reference to the issue of export subsidies, interrelationship between Article 8 of the Agreement on Agriculture and Article 3.1 of the Agreement on Subsidies and Countervailing Measures was addressed by both the Panel¹⁰⁶ and the Appellate Body¹⁰⁷ in the *Canada - Dairy Products* case. In the panel report it was stated that the Agreement on Agriculture does permit the use of export subsidies, but "only within the limits of the budgetary outlay and quantity commitments levels" in the relevant Member States' WTO schedules.¹⁰⁸ The Appellate Body adopted a similar line when it provided that export subsidies for agricultural products had to be firstly examined against the provisions of the Agreement on Agriculture, and only if they did not fall within the provisions of that agreement were they then to be addressed by Article 3.1 of the Agreement on Subsidies and Countervailing Measures.¹⁰⁹

A question therefore arises as to the role and function of Article 13 of the Agreement on Agriculture, and its effect on its expiration. A problem arises in the interpretation of this provision in the context of the aforementioned provisions, to the extent that Chambovey is of the opinion that the Article 13 provisions appear to "be reduced to inutility", its interpretation thereby being "dissonant with the principle of effectiveness in the interpretation of treaties",¹¹⁰ with the expiry of the "peace clause" of Article 13 having no effect on the pre-existing relationship between Article 8 of the Agreement on Agriculture and Article 3.1 of the Agreement on Subsidies and Countervailing Measures. However, as pointed out by Chambovey, Agricultural export subsidies, while protected from Article 3.1 of the SCM agreement, could still be actionable under Article XVI GATT. These conflicting view points can only be resolved by a WTO Panel decision on the point.

As can be seen, as agricultural commodities, along with other primary commodities, are treated differently from non-primary commodities, for export subsidies, by virtue of Article XVI.B.3¹¹¹ of GATT, they also are dealt with differently for the

¹⁰⁶ *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products-Report of the Panel*, (17 May 1999) WT/DS103/R, WT/DS113/R, at para 7.20.

¹⁰⁷ *Canada - Measures affecting the Importation of Milk and the Exportation of Dairy Products, Recourse to Article 21.5 of the DSU by New Zealand and the United States- Report of the Appellate Body*, (3 Dec 2001), WT/DS103/AB/RW, WT/DS113AB/RW, at para 123.

¹⁰⁸ D Chambovey (n 103).

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Art XVI.B.3. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory such subsidy shall not be applied in a manner which results in that contracting party having more than a suitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product. (For the purposes of Section B, a "primary product" is understood to be any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.)

purposes of anti-dumping matters. As long as the test of not "more than an equitable share of world export trade in that product" can be met, then export subsidies are permitted for agricultural goods, resulting in the consequence that a normal price for agricultural goods on the world export market would be regarded as a dumping price for manufactured goods. There is however, a requirement, to reduce export subsidies, in line with agreed commitments, pursuant to Article 3.3 of the Agreement on Agriculture.¹¹² There is an agreement amongst the WTO Member States to "work toward the development of internationally agreed disciplines" dealing with "export credits, export credit guarantees or insurance programmes", and once such agreement is reached to "provide export credits, export credit guarantees or insurance programmes only in conformity therewith".¹¹³ Such an agreement at the WTO has yet to be reached. The above provisions are reflected in the post-Uruguay round operation of the CAP's common organisations. It is to be anticipated that the Millennium Round negotiation on Agriculture will pursue this issue, and introduce greater rigour in the regulation of international trade in agricultural commodities. In addition, the exact interaction between the WTO Agreement on Agriculture and both the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and the SCM Agreement, in light of the expiry of the "peace clause" will need to be addressed.

Rules of Origin

The issue of rules of origin remained the main unharmonised provision after the coming into force of the Tokyo Round's Custom's Valuation Code in 1979 and the International Convention on the Harmonized Commodity Description and Coding System of the then named customs Co-operation Council (now known as the World Customs Organisation) in 1988.¹¹⁴ Guidelines were provided in the CCC convention dealing with Rules of Origin, however it did not regulate this particular matter. This lack of a standard "rule of origin" system is of particular relevance to the EC, which "is one of the most enthusiastic users of free-trade areas and customs unions",¹¹⁵

¹¹² Agreement on Agriculture (15 Apr 1994) LT/UR/A-1A/2, Art 3.3; "Subject to the provisions of paragraphs 2(b) and 4 of Art 9, a member shall not provide export subsidies listed in paragraph 1 of Art 9 in respect of the agricultural products or groups of products specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitment levels specified therein and shall not provide such subsidies in respect of any agricultural product not specified in that Section of its Schedule.

¹¹³ F Snyder (n 100).

¹¹⁴ S Inama 'A Comparative Analysis of the Generalized System of Preferences and Non-Preferential Rules of Origin in the Light of the Uruguay Round Agreement; Is it a Possible Avenue for Harmonization or Further Differentiation?' (1995) 29(1) JWT 77-111.

¹¹⁵ B Driessen and F Graafsma 'The EC's Wonderland; an Overview of the Pan-European Harmonised Origin Protocols' (1999) 33(4) JWT 19-45.

with the EC operating different systems in its variety of agreements, ranging from its Lomé/Cotonou relations to its GSP and Euro-Med relations.¹¹⁶ Rules of Origin break up into two distinct groups, preferential and non-preferential rules of origin. The non-preferential rules of origin "are commonly understood to apply to most favoured nation (MFN) trade"¹¹⁷ and are now regulated by the Uruguay Round Agreement on Rules of Origin, to which is annexed,¹¹⁸ a Common Declaration with Regard to Preferential Rules of Origin. The legal status of this declaration, which deals with rules of origin in the case of the GSP scheme, or in free trade agreements, is not clear.¹¹⁹

The WTO Agreement on Rules of Origin for non-preferential trade reads as a document reflecting work in progress. It provides clarity as to when non-preferential rules of origin are to be applied,¹²⁰ and provisions for their application during a transition period during which clearer rules on "rules of origin" are to be determined. A Committee on Rules of Origin is set up within the WTO structure, under Article 4.1 of the Agreement, which, assisted by a WTO Technical Committee on Rules of Origin, (Article 4.2) working with the International law body then known as the Customs Co-operation Council, now known as the World Customs Organisation (WCO),¹²¹ is to draft new WTO regulations for non-preferential "Rules of Origin". This is an "ambitious agenda" for the WCO, "to elaborate a harmonized set of non-preferential rules of origin based on the process criterion" set against years of varied practice throughout the world.¹²² The UNCTAD, for its part, has, with few results, through its Special Committee on Preferences, "been discussing possible harmonisation of GSP rules of origin for almost twenty years".¹²³ Agreement on non-preferential rules of origin could lead to further developments in the preferential rules of origin debate. For its part the EC has legislated for non-preferential rules of origin in Regulation 2913/92,¹²⁴ which deals with the EC's Common Customs Code. This code "defines the non-preferential origin of goods" for the purposes of "the application of the EC's customs tariff",¹²⁵ with "the Communities rules on

¹¹⁶ Ibid.

¹¹⁷ S Inama (n 114).

¹¹⁸ Annex II.

¹¹⁹ S Inama (n 114).

¹²⁰ Art 1.2, when read in conjunction with Art 1.1 of the Agreement on Rules of Origin provides that "Rules of origin (covered by this agreement)... shall include all rules of origin used in non-preferential commercial policy instruments, such as in the application of most-favoured-nation treatment under Arts I, II, III, XI of GATT 1994; anti-dumping and countervailing duties under Art VI of GATT 1994; safeguard measures under Art XIX of GATT 1994; origin marking requirements under Art IX of GATT 1994; and any discriminatory quantitative restrictions or tariff quotas. They shall also include rules of origin used for government procurement and trade statistics.

¹²¹ <http://www.wcoomd.org>

¹²² S Inama (n 114).

¹²³ Ibid.

¹²⁴ Regulation 2913/92, Official Journal, L302, 13 October 1992

¹²⁵ F Snyder (n 100).

non-preferential origin” following closely those set out in the WTO Agreement on the Rules of Origin.¹²⁶

While the rules on preferential rules of origin differ from scheme to scheme,¹²⁷ the concept of preferential measures is set out in Article 20(3)(d) and (e)¹²⁸ of Council Regulation 2913/92.¹²⁹ A distinction is also made between “goods wholly obtained in one country” and goods whose origin “involved more than one country”.¹³⁰

Within the EC the issue of multi-origin goods, (known as “goods whose production involved more than one country”, allied with the issue of regional cumulation for Rules of Origin differs considerably between the non-preferential rules of origin, and, for example, the EC’s regulation of its GSP, with the system operating for the GSP being stricter than that being applied for MFN states. Both schemes are provided for in a document by the EC, Commission Regulation 2454/93,¹³¹ which was passed in order to implement the EC’s Common Customs Code,¹³² which itself is contained in Regulation 2913/92.¹³³ The EC, following international guidance, deems goods, under the non-preferential rules, to originate from the country where they underwent their last substantial working or processing.¹³⁴ For goods under the preferential rules of origin, as in the GSP scheme, the EC requires goods to change their tariff heading classification in their country of last processing, in order to be deemed to have come from that country.¹³⁵ While the preferential text is technical and explicit, in adopting the process criterion, the non-preferential test is generally considered to permit “a certain degree of discretion in the hands of” the EC institution which is interpreting this provision.¹³⁶

Regional cumulation provisions for preferential rules also distinguishes preferential and non-preferential rules of origin, as there is no provision for regional cumulation in the non-preferential rules of origin, and goods must originate “within

¹²⁶ Ibid.

¹²⁷ GSP, Cotonou, EFTA, etc.

¹²⁸ Art 20.3. Council Regulation 2913/92; “The Customs Tariff of the European Communities shall comprise:

(d) the preferential tariff measures contained in agreements which the Community has concluded with certain countries or groups of countries and which provide for the granting of preferential tariff treatment

(e) preferential tariff measures adopted unilaterally by the Community in respect of certain countries, groups of countries or territories”.

¹²⁹ F Snyder (n 100).

¹³⁰ Ibid.

¹³¹ Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, Official Journal L 253, 11/10/1993 at 1.

¹³² S Inama (n 114).

¹³³ Council Regulation (EEC) No 2913/92 of 12 Oct 1992 establishing the Community Customs Code, Official Journal L 302, 19/10/1992 at 1.

¹³⁴ S Inama (n 114).

¹³⁵ Ibid.

¹³⁶ Ibid.

a single country".¹³⁷ In the preferential schemes, the EC has established "special rules on regional cumulation for specific regional groupings",¹³⁸ such as ASEAN¹³⁹ or CACM.¹⁴⁰ In these cases, "products originating" from one country in a regional group, "and used in further manufacture in another country of the group must be treated as if they originated in the country of further manufacture".¹⁴¹ This will happen, only if certain conditions are met.¹⁴² Some preferential schemes offer full regional cumulation, others, such as the EC's GSP are only offered "partial" regional cumulation. Full regional cumulation is granted to the ACP countries under the Lomé / Cotonou agreements.¹⁴³ The variety of practices existing in the area of "rules of origin" as a whole is such that, as Imana has stated "the 'neutral' concept of origin is long gone: today's rules of origin are used as, or simply are, instruments of commercial policy".¹⁴⁴ This lack of neutrality would of itself, bring this issue to the fore of the WTO's trade policy review investigations.

The role of the WTO's Committee on the Rules of Origin, operating, through the WTO's Technical Committee on Rules of Origin, with the WCO, will have to resolve the many complexities of regulation in this area, initially, as set out in the WTO Agreement on Rules of Origin, for non-preferential rules of origin, but also, in the absence of some developments at UNCTAD on GSP rules of origin, some way down the line, also on preferential rules of origin. Of some consolation to the readers of this paper is the fact that agricultural products are normally raw materials, or materials at the first state of processing which, for practical purposes, do not normally give rise to complex questions as to origin. Any agricultural product which has undergone substantial processing has normally ceased to be an agricultural product, and has changed its HS classification. We await further clarification from the WTO on this issue.

The Common Customs Code

A parallel legal issue is that of the EC's Common Customs Code. While not regulated by the WTO, but rather by the WCO, is one area where substantial global harmonisation providing a substantial level backdrop current and future work of the WTO in the area of trade in agricultural commodities. The EC, in its Common Cus-

¹³⁷ Ibid.

¹³⁸ F Snyder (n 100).

¹³⁹ Association of South - East Asian Nations.

¹⁴⁰ Central American Common Market.

¹⁴¹ F Snyder (n 100).

¹⁴² As set out in Art 72a(2) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 (as amended), Official Journal L 253, 11/10/1993 at 1.

¹⁴³ S Inama (n 114).

¹⁴⁴ Ibid.

toms Tariff now “follows closely the structure of the Harmonised System”,¹⁴⁵ of the World Customs Organisation, (WCO), as do many other countries around the world. The WCO, known before 1994 as the Customs Co-operation Council,¹⁴⁶ operated the Common Customs Code (CCC). The CCC was set up under the International Convention on the Simplification and Harmonisation of Customs Procedures was first signed in Kyoto on 18 May 1973, and entered into force on 25 September 1974. It is currently being updated by the 1999 Revised Convention, which still has to be fully adopted by the members of the WCO. The WCO comprises 150 members and is based in Brussels. The Harmonised Commodity Description and Coding System (HS) operated by the WCO, entered into force on 1 January 1988, and is used by its Member States, the EC and the WTO for the classification of commodities.

While only countries can become members of the International Convention on the Simplification and Harmonisation of Customs Procedures 1973, as all the Member States of the EC have signed this convention, the ECJ took the view in the case of *Nederlandse Spoorwegen v Inspecteur der Invoerrechten en Accijnzen*¹⁴⁷ that “the Community has replaced the Member States in commitments arising from the Convention”,¹⁴⁸ with either the Member State holding the Presidency of the EC, or the Commission representing the EC at WCO meetings.

The EC has signed the International Convention on the Harmonised Commodity Description and Coding System, 1983, and its amending protocol (1986),¹⁴⁹ on the basis of Articles 26 and 133 EC (formerly Articles 28 and 113 EC), and as reflected in the case of *Commission of the European Communities v Council of the European Communities*.¹⁵⁰ In this case the Commission had sought to argue that Council Decision 87/369,¹⁵¹ which implemented the provisions of the International Convention on the Harmonized Commodity Description and Coding System was incorrectly based. The Commission’s view was that this decision should have been made exclusively on the basis of the then Article 113 EC, and not on the mix of “Articles 28, 113 and 235 of the Treaty”¹⁵² as was adopted by the Council. The then Article 28 EC, now Article 26 EC, provides for the Common Customs Tariff, with

¹⁴⁵ F Snyder ‘Governing Economic Globalisation: Global Legal Pluralism and EU law’ in F Snyder (ed) *Regional and Global Regulation of International Trade* (Hart Publishing Oxford – Portland Oregon 2002).

¹⁴⁶ Founded in 1952.

¹⁴⁷ Case 38/75 *Nederlandse Spoorwegen v Inspecteur der Invoerrechten en Accijnzen* [1975] ECR 1439.

¹⁴⁸ F Snyder (n 145).

¹⁴⁹ Harmonised Commodity Description and Coding System, 1983, and its amending protocol (1986) OJ 1987 L198/3, 1035 UNTS 3, KAV 2260.

¹⁵⁰ Case 165/87 *Commission of the European Communities v Council of the European Communities* [1988] ECR 5545.

¹⁵¹ Council Decision 87/369 of 7 April 1987 concerning the conclusion of the International Convention on the Harmonized Commodity Description and Coding System and of the Protocol of Amendment thereto Official Journal 1987, L 198 at 1.

¹⁵² Case 165/87 (n 150).

duties being "fixed by the Council acting by a qualified majority on a proposal from the Commission". The ECJ found that the "establishment of a tariff nomenclature" was indispensable to the application of customs duties,¹⁵³ and that the dual basis utilised by the Council, relying on both Article 28 EC and Article 113 EC was appropriate.¹⁵⁴ This HS nomenclature replaced the Brussels Tariff Nomenclature, which originated from the Convention for the Classification of Goods in Customs Tariffs of 15 December 1950, managed and interpreted by the Customs Co-operation Council. The Brussels Tariff Nomenclature was adopted by the EEC when introducing the Common Customs Code in 1968, pursuant to Regulation 950/68.¹⁵⁵ The Harmonised System has been adopted as the "Combined Nomenclature", and is contained in Annex I of Council Regulation (EEC) 2658/87,¹⁵⁶ meeting the requirements of both the "Common Customs Tariff and of the external trade statistics of the Community".¹⁵⁷ (It should be noted that Annex I is replaced annually, "by the Commission with the assistance of the Nomenclature Committee"¹⁵⁸ pursuant to Council Regulation 2658/87.)¹⁵⁹

Conclusion

From this brief study of the above selection of topics the Common Commercial Policy (CCP) of the EC, as expressed by Article 133 EC, and as interpreted by *Opinion 1/94*,¹⁶⁰ has and will continue to have a profound impact on the EC's external trade in agricultural commodities. An impact has not only been felt by EC policy makers and regulators from the existing WTO legal texts, but future development arising from existing legal texts still have to evolve. In addition current WTO positions and documents indicate future areas for development in this area. In addition, possible future developments arising from any legal texts, and undoubtedly there must be, emanating from the current WTO/GATT round of negotiations must be anticipated. As to the detail of such commitments we may have yet to wait some years for clarification. What is beyond doubt is that Fortress Europe, to the extent that it exists for trade in agricultural commodities, is under a concerted and continuous assault from WTO commitments.

¹⁵³ At point 8 of the judgment.

¹⁵⁴ At points 12 and 13 of the judgment.

¹⁵⁵ Regulation (EEC) No 950/68 of the Council of 28 June 1968 on the Common Customs Tariff, Official Journal L 172, 22/07/1968 at 1.

¹⁵⁶ Council Regulation (EEC) 2658/87 on the tariff and statistical nomenclature and the Common Customs Tariff, OJ 7.9.87 L256/1.

¹⁵⁷ F Snyder (n 100).

¹⁵⁸ Ibid.

¹⁵⁹ Council Regulation (EEC) 2658/87 (n 156).

¹⁶⁰ *Opinion 1/94 (Re the Uruguay Round Treaties)* [1994] ECR 5267.

THE WINDS OF CHANGE BLOW AGAIN: THE WORLD TRADE ORGANISATION'S IMPACT ON THE EUROPEAN COMMUNITY'S COMMON AGRICULTURAL POLICY

ABSTRACT. This paper examines the legal relationship between the *World Trade Organisation's Agreement on Agriculture* and the *European Community's Common Agricultural Policy (CAP)*, in light of the reopening of the *WTO Agricultural Negotiations* in the *Millennium Round*. It also examines the impact of the *Uruguay Round Agreement on Agriculture*, on the *Mac Sharry* reforms of the CAP. An in depth study of the EC's *Cereals Common Organisation* is included.

REOPENING OF WTO AGRICULTURAL NEGOTIATIONS

Agriculture is one of the most developed policies within the EC, and one of the most contentious at a World Trade level. It is often overlooked by the uninitiated, who find that its high level of development has led to a complexity which some find off putting. In addition, the terminology used is often more familiar to the family farmer than to the legal academic. The perception that the law pertaining to Agriculture at both the EC and the world trade level can be ring fenced and can be ignored by lawyers interested in other areas of law is erroneous. By the very nature of its high level of development, EC Agricultural law, and its interaction with WTO regulation can lead to the development of legal solutions to address agricultural issues which eventually cascade into other EC and WTO legal arenas. At one stage EC Agricultural issues comprised one third of the case law of the ECJ. This volume of case law has led to the development of core EC law principles. It is anticipated that a similar situation will arise at a World Trade level, and at the nexus between WTO regulation and EC law.

World Trade regulation in Agriculture is primarily contained in the WTO Agreement on Agriculture, which, along with GATT 1994 and GATT 1947,¹ is annexed to the Agreement Establishing the World Trade

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¹ All WTO legal documents are available at <http://www.wto.org>.



Organisation.² These documents, with the exception of GATT 1947, are the product of the Uruguay Round of negotiations, which lasted from 1986 to 1994. It was envisaged at the time that these documents would be eventually superseded by documents leading to even greater liberalisation of trade pursuant to further multilateral negotiations. The WTO Agreement on Agriculture, for its part, provided at Article 20³ that negotiations would reopen "one year before the end of the implementation period" of that agreement, with a view to obtaining "substantial progressive reductions in support and protection resulting in fundamental reform". These negotiations, have now reopened. Negotiations in phase 1,⁴ which ran from the 23rd March 2000 to the 27th March 2001 have already concluded, with phase 2 of the Agricultural negotiations, which opened on the 26th March 2001 still ongoing. These negotiations have been refocused by the Doha Ministerial Declaration of November 2001.⁵ The Uruguay round of

² In Annex 1.

³ WTO Agreement on Agriculture; Continuation of the Reform Process. Article 20, "Recognising that the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process, Members agree that negotiations of continuing the process will be initiated one year before the end of the implementation period, taking into account (a) the experience that date from implementing the reduction commitments; (b) the effects of the reduction commitments on world trade in agriculture; (c) non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market-oriented agriculture trading system, and the other objectives and concerns mentioned in the preamble to this Agreement; and (d) what further commitments are necessary to achieve the above mentioned long-term objectives.

⁴ Phase 1 negotiations led to 7 meetings, 45 proposals, and a wide variety of documents and proposals.

⁵ The *Doha Ministerial Declaration of November 2001*, at points 13 and 14, which provided; 13. "We recognize the work already undertaken in the negotiations initiated in early 2000 under Article 20 of the Agreement on Agriculture, including the large number of negotiating proposals submitted on behalf of a total of 121 members. We recall the long-term objective referred to in the Agreement to establish a fair and market-oriented trading system through a programme of fundamental reform encompassing strengthened rules and specific commitments on support and protection in order to correct and prevent restrictions and distortions in world agricultural markets. We reconfirm our commitment to this programme. Building on the work carried out to date and without prejudging the outcome of the negotiations we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support. We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development. We

negotiations led to international legal commitments of both the EC and its member states, both being members of the WTO, which has led to a radical change in the internal legal structures of the EC's Common Agricultural Policy (CAP). A new WTO Agreement on Agriculture could lead to more changes. It is proposed in this paper to examine the effect of the 1994 WTO agreement on the CAP, taking cereals as a case study, and to look forward to prospect of future changes to the CAP arising from the interaction of the regional legal entity of the EC with the global regulatory body of the WTO.

THE LEGAL INTERACTION BETWEEN THE EC AND THE WTO

The EC Treaty has operated to transfer sovereignty in matters pertaining to agriculture from the member states of the EC to the EC,⁶ with the agricultural policy of what is currently the 15 member states⁷ of the European Union, operating a unified Agricultural Policy, the Common Agricultural Policy, or CAP. Each of the member states of the EC, together with the EC, have all signed up to the global trading agreements, the there main ones being GATT 1994,⁸ GATS⁹ and TRIPS.¹⁰ These are enforced through the World Trade Organisation dispute settlement mechanism, which also operates the Agreement on Agriculture. The regional Common Agricultural Policy of the EC, and the WTO Agriculture agreement, have different histories, different emphases, and differences in political underpinnings. The regimes of both the EC and the WTO in the area of Agriculture are legally binding.

Article 302 EC¹¹ empowers the European Commission, to "maintain such relations as are appropriate with all international organisations.

take note of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirm that non-trade concerns will be taken into account in the negotiations provided for in the Agreement on Agriculture." 14. "Modalities for the further commitments, including provisions for special and differential treatment, shall be established no later than 31 March 2003. Participants shall submit their comprehensive draft Schedules based on these modalities no later than the date of the Fifth Session of the Ministerial Conference. The negotiations, including with respect to rules and disciplines and related legal texts, shall be concluded as part and at the date of conclusion of the negotiating agenda as a whole."

⁶ See EC Treaty, Articles 32 to 38 EC, (ex. Articles 38 to 46 EC).

⁷ Belgium, Netherlands, Luxembourg, Germany, Italy, France, Spain, Portugal, Greece, Ireland, United Kingdom, Denmark, Sweden, Finland, Austria.

⁸ The General Agreement in Tariffs and Trade 1994, which was preceded by GATT 1947.

⁹ General Agreement for Trade in Services.

¹⁰ Trade Related Issues of Intellectual Property.

¹¹ EC Treaty, Article 229 EC, pre-Amsterdam.

European Law requires the EC to adhere to all of its international law commitments, with "the provisions of such an agreement" being deemed to form an integral part of the community system",¹² with an obligation being placed on the ECJ to ensure the "uniform application" of the terms of such agreements throughout the Community"¹³ in order to ensure that they are not used to create barriers to trade. As neither the World Trade Organisation nor GATT is expressly referred to in the EC treaty,¹⁴ the relationship between the two organisations, in the context of EC jurisprudence, has been developed by way of case law of the ECJ.

ECJ jurisprudence recognises that the EC was substituted for the Member States with regard to commitments under the GATT as far back as on the 1st July 1968, when the EC introduced its Common Customs Tariff.¹⁵ The ECJ has taken upon itself the role of interpreter of the GATT by way of preliminary ruling under Article 234 EC,¹⁶ with regard to issues arising as and from that date, (1968).¹⁷

In 1972 the ECJ, in *International Fruit*¹⁸ recognised that the provisions of GATT 1947 was binding on the Community, however the same case went on to say that the issue of whether or not an EC provision is illegal because it is in breach of a public international law obligation, it is necessary to establish; 1. The public international obligation is binding on the Community, and 2, where the proceedings are before a national court, that the rule is self-executing.¹⁹ Regard must also be had to the "spirit, the structure and the terms of the convention".²⁰ In 1972 it was found that, because there was great flexibility in the earlier GATT, it was considered that the particular part of GATT in question at the time, was not self-executing. Such an argument would not be as persuasive with regard to the GATT 1994. The ECJ has yet to overturn a provision of EC law on the

¹² *Hauptzollamt Manz v. C.A. Kupferberg & Cie. K.G. a.A.* (reference for a preliminary ruling from the *Bundesfinanzhof*) Case 104/51 [1982] ECR 3641.

¹³ *Supra* n. 12.

¹⁴ Although reference is made to international reciprocal agreements under EC Treaty, Article 310 (Article 238 EC, pre-Amsterdam).

¹⁵ *Annenistrazione delle Finanze dello State v. Societa Petrolifera Italiana SpA (SPI) and SpA Michelen Italiana (SAMI)* (reference for a preliminary ruling from the *Corte Suprema di Cassazione*); Joined Cases 267-269/81 [1982] ECR 801.

¹⁶ EC Treaty, Article 177, pre-Amsterdam.

¹⁷ *Supra* n. 15.

¹⁸ *International Fruit Company N.V. and others v. Productschap Voor Groenten en fruit* (No. 3) (Case 21-24/72).

¹⁹ *Supra* n. 18.

²⁰ *Supra* n. 18.

basis that it is incompatible with GATT rules,²¹ however the policies of the EC have had to be amended to meet the EC's international legal obligations under the WTO agreement. An examination of these amendments will be made in this paper with regard to the common organisation of cereals. In *Opinion 1/94*²² the ECJ held that the Common Commercial Policy of the EC currently enshrined in Article 133 EC²³ entitled the Commission to develop an external Common Commercial Policy.²⁴ Agricultural matters are linked with the Common Commercial Policy.

BASIC TOOLS OF THE CAP

The Common Agricultural Policy of the EC developed against the backdrop of the perception that "farmers had a special role in society", particularly given the scarcity of food during and after the Second World War.²⁵ The six originating member states of the EEC were "far from self-sufficient in foodstuffs", and there was perceived to be "no justification for the unilateral opening up of markets"²⁶ at that period in history. The Spaak report of April 1956 advocated special treatment for agriculture,²⁷ in comparison to other activities, on account of the need for food for human life, social stability of rural society, and the climatic and other natural factors which are out with human control, which affected farming more than other economic activities.²⁸ In addition, regional disparities became another factor in dealing with the agricultural industry in a different manner to other economic activities.²⁹ The Stresa Conference of 1958 emphasised the social stability of rural areas and the need to

²¹ Frederick M. Abbott, *Law and Policy of Regional Integration – The NAFTA and Western Hemispheric Integration in the World Trade Organization System* (Kluwer, 1995), at p. 56.

²² *Opinion 1/94 of 15.11.1994 Opinion pursuant to Article 228(6) of the EC Treaty*. ECJ [1994] 5267.

²³ EC Treaty, Article 113, pre-Amsterdam.

²⁴ Introducing the concept of Implied Parallel Powers into EC jurisprudence. See A. Appella "Constitutional Aspects of Opinion 1/94 of the ECJ concerning the WTO", *International and Comparative Law Quarterly* 45 (April 1996), pp. 440–462.

²⁵ R. Moehler; "The Role of Agriculture in the Economy and Society", paper presented at the *Seminar on Beliefs and Values Underlying Agricultural Policies*, Lake Balaton, Hungary, September 19–23, 1996, <http://www.fao.org/docrep/W7440E/w7440e03.htm>, accessed 25.1.02.

²⁶ L. Van Depoele, "The Common Agricultural Policy and the Accession of Central and Eastern European Countries", <http://www.zum.It/akof/kalbos/kal01.htm>, accessed 25.2.02.

²⁷ *Supra* n. 25.

²⁸ *Supra* n. 25.

²⁹ *Supra* n. 25.

reinforce the family farm. The provisions of the Treaty of Rome derived from a compromise between existing national interests of the six member states,³⁰ with the intention of increasing productivity, stabilising markets and guaranteeing reasonable income for farmers, and reasonable prices for consumers,³¹ and was strongly influenced by President Roosevelt's New Deal policy of the pre-war years.³²

The basic tools of the CAP included;

1. Target prices, being the prices that farmers should obtain on the open market;
2. Intervention Prices, being the prices at which intervention agencies would buy in surplus produce. This was subsequently modified to include "quality standards and other regulations" concerning what would be bought into intervention,³³
3. Threshold prices at the frontier, being the lowest possible price that goods would be bought into the community, the difference between world market prices and threshold prices being adjusted by way of variable import levies imposed by the EEC;³⁴
4. Export subsidies, which would be payments made by the EEC on goods being sold out of the Community onto the world market, to allow for the differential between world prices, and the internal EEC price for that produce. In the unlikely event that world prices were higher than Community prices, then an export tax would be chargeable on the export of the agricultural produce.³⁵ The main principles of the Common Agricultural policy became "the common market, financial solidarity and Community preference",³⁶ with the supposedly uniform prices for commodities throughout the EC. The CAP has in more recent years been evolving into a two pillar structure, with the second pillar contributing to a new European Rural Policy. The development of the CAP since its inception can be seen as evolving from both the internal and external needs of the CAP to reform. The 1980s expensive side effects of CAP of the butter mountains and wine lakes of the 80s, while the CAP, by 1988, had grown to account for over half of the EC Budget, with the estimation that the CAP cost 160 ECU to

³⁰ R. Volonien, Secretary General of COPA and COGECA DIS (01) 04, Speech in *AGRO-FOOD 2001*; 7.2.2001; Tampere, Finland.

³¹ *Supra* n. 30.

³² *Supra* n. 30.

³³ *Supra* n. 26.

³⁴ *Supra* n. 26.

³⁵ *Supra* n. 26.

³⁶ *Supra* n. 25.

benefit a farmer by 100 ECU,³⁷ resulting in serious inefficiencies and also proving highly contentious, accounting for a very large volume of case law before the ECJ.

BASIC TOLLS OF THE WTO AGREEMENT ON AGRICULTURE

While the original drafts of GATT 1947 treated manufactured and agricultural goods in exactly the same way, pressure from the US to protect the provisions of the US Agricultural Adjustment Act 1933, led to provisions in GATT 1947 which led to a "proliferation of a wide range of non-tariff barriers to agricultural trade".³⁸ This situation was exacerbated in 1955 when the US was granted, by the GATT contracting parties, "a waiver permitting it to impose quota on agricultural imports in a manner inconsistent with Article XI(c)".³⁹ The view developed at that time, at a global level, that domestic measures supporting indigenous farming communities was not a matter for international regulation. The Tokyo round of GATT negotiations developed the position of agriculture within the regulatory mechanism, with the Tokyo Declaration of Ministers of the 14th September 1973 leading to the coming into force of two commodity agreements in the area of agriculture, the International Bovine Meat Agreement⁴⁰ together with the setting up of the International Meat Council,⁴¹ and the International Dairy Agreement,⁴² which was accompanied by the establishment of the International Dairy Products Council.⁴³ It was however, only at the Uruguay round, which led, *inter alia*, to the Agreement on Agriculture, that Agricultural issues came centre stage in GATT negotiations, and Agriculture became one of the more highly contentious issues in the negotiations that led to the agreement of the final treaty texts.

The WTO, which came into being pursuant to the Uruguay round agreements, operates a multi-lateral trading system "based on a non-intrusive, non-discriminatory, national treatment approach",⁴⁴ with national govern-

³⁷ National Consumer Council, "Consumers and the Common Agriculture Policy", in *The Future of the CAP: The NCC's Conclusions and Recommendations* (1988).

³⁸ K.C. Kennedy, "Reforming Farm Trade in the Next Round of WTO Multilateral Trade Negotiations", *Journal of World Trade* 35/6 (2001), pp. 1061-1079.

³⁹ *Supra* n. 38.

⁴⁰ GATT Treaty Texts, Booklet 8 July 1995.

⁴¹ See also the Official Journal of the European Communities, OJ [1980] L 71/7.

⁴² GATT Treaty Texts, Booklet 10(c), issued December 1995.

⁴³ See also the Official Journal of the European Communities, OJ [1980] L 71/11.

⁴⁴ OECD, *Regional Integration and the Multilateral Trading System: Synergy and Divergence, Executive Summary* (OECD, 1995), at p. 46.

ments being free to maintain "divergent policies".⁴⁵ The WTO Agreement on Agriculture, concluded pursuant to the Uruguay Round of negotiations which concluded in 1994 applied to the GATT members as a whole, and covered four target areas:

1. Internal Support;
2. Export Subsidies,
3. Market Access,
4. Food Security (to encourage stockpiling instead of trade protection, to achieve food security objectives).

While all of these issues have had an effect on the Common Agricultural Policy of the European Union, it is perhaps the internal support measures that have had the greatest, and most direct, impact in the short term.

EFFECT OF THE WTO AGREEMENT ON AGRICULTURE ON CAP AFTER URUGUAY

The Common Agricultural Policy of the EC is structured around common organisations, as provided for by Article 34 EC.⁴⁶ Three possible forms of common organisations are provided for; (1) one based on the common rules on competition, (2) one based on compulsory co-ordination of the various national market organisations, and (3) a European market organisation. The superstructure of CAP was to be based on a three pillar structure,⁴⁷ one of "community preference, common prices and common financing".⁴⁸ The first pillar, community preference, was based on Article 44.2,⁴⁹ which has now been repealed by the Amsterdam Treaty. How effective the second pillar of common prices has operated, is questionable.⁵⁰ The third option of a European Common Market association has proved to be very popular, with a large number having been set up.⁵¹

⁴⁵ *Supra* n. 44.

⁴⁶ Ex. Article 40 EC.

⁴⁷ McMahon is of the opinion that in later years a forth pillar of co-responsibility was added. See J. A. McMahon, *Law of the Common Agricultural Policy* (Pearson Education, 2000), at p. 166.

⁴⁸ E. Neville-Rolfe *The Politics of Agriculture in the European Community* (Policy Studies Institute, May 1984).

⁴⁹ EC Treaty, Article 44.2: "Minimum prices shall neither cause a reduction of the trade existing between Member States when this Treaty enters into force or form an obstacle to progressive expansion of this trade. Minimum prices shall not be applied so as to form an obstacle to the development of a natural preference between Member States."

⁵⁰ *Supra* n. 48.

⁵¹ At present there are 22 common market organisations and a number of other arrangements:

These organisations have resulted in the centralisation of policy with respect to each product covered. National organisations have been effectively replaced by Common organisations, with national organisations only being permitted to operate to the extent that they do not conflict with Common organisations.⁵² Market organisations can be grouped and classified according to the extent and degree, or the absence of market support. This support depends on the economic importance, of lack of same, to the Community. Products with the greater economic importance have the most developed, rigid and protective regulations, especially where the income related thereto is important in relation to farming income as a whole. Products with relatively less economic importance are treated more flexibly, while products of little economic significance to the Community as a whole, but which are important locally, may include internal financial support measures.⁵³

Cereals	Council Regulation No. 1766/92 (OJ L 181/21);
Pig Meat	Council Regulation No. 2759/75 (OJ L 282/1);
Eggs	Council Regulation No. 2771/75 (OJ L 282/49);
Poultry	Council Regulation No. 2775/75 (OJ L 282/77);
Fruit and Vegetable	Council Regulation No. 1035/72 (OJ L 118/1);
Wine	Council Regulation No. 822/87 (OJ L 84/1);
Milk Products	Council Regulation No. 804/68 (OJ L 148/13);
Beef and Veal	Council Regulation No. 805/68 (OJ L 148/24);
Rice	Council Regulation No. 1418/76 (OJ L 166/1);
Oils and Fats	Council Regulation No. 136/66 (OJ L 1966/3025);
Sugar	Council Regulation No. 1785/81 (OJ L 177/4);
Flowers and Live Plants	Council Regulation No. 234/68 (OJ L 55/1);
Processed Food and Vegetables	Council Regulation No. 516/77 (OJ L 73/1);
Raw Tobacco	Council Regulation No. 2075/92 (OJ L 215/70);
Hops	Council Regulation No. 1696/71 (OJ L 175/1);
Fibre Flax and Hemp	Council Regulation No. 1673/2000 (OJ L 193, 29/7/2000, p. 6);
Dehydrated Fodders	Council Regulation No. 603/95 (OJ L 63, 21/3/95, p. 1);
Seeds	Council Regulation No. 235871 (OJ L 246/1);
Sheep Meat and Goat Meat	Council Regulation No. 3013/89 (OJ L 289, 7/10/89, p. 1);
Fishery Products	Council Regulation No. 101/76 (OJ L 289, 7/10/89, p. 1);
Bananas	Council Regulation No. 404/93 (OJ L 47, 25/2/93, p. 1);
Certain Annex 2 products	Council Regulation No. 827/68 (OJ L 151, 30/6/68, p. 16).

Special Measures (re production aids)

Peas and Beans	Council Regulation No. 1431/82 (OJ L No.162/28);
Linseed	Council Regulation No. 569/76 (OJ L No.67/29);
Soya Beans, Rape Seed, Colza	Council Regulation No. 3766/91 (OJ L No.356, 24/12/1991,
Seed and Sunflower Seed	p. 17);
Silkworms	Council Regulation No. 845/72 (OJ L No.100/1).

⁵² Case 36/70: *Getreide Import* [1970] ECR 1107.

⁵³ M. Melchor, *European Perspectives: 30 Years of Community Law* (Commission of the European Communities, 1983).

Historically, the basic regulation on financing of the Common Agricultural Policy was Council Regulation 729/70,⁵⁴ which confirmed the European Agricultural Guarantee and Guidance Fund,⁵⁵ which was established by Council Regulation 25/62.⁵⁶ This fund was separated into two sections:

1. Guarantee spending, originally without, but now subject to budget limits, and is sometimes applied on a co-financing basis;
2. Guidance operations, mainly used for investment projects, but limited to specific amounts.

The Guarantee section was subdivided into two:

1. Export refunds,
2. Interventions intended to stabilise agricultural markets, to include all internal market measures under the common market organisations. These included 1st category interventions, i.e. amounts per weight. These were nearly all aids or premiums, and were totally financed by the community. Second category interventions included purchasing and storage operations. This expenditure was usually expressed in the form of a price. As these products may have later been sold the expenditure is the sale price less the purchase price and processing and storage price.⁵⁷ The EAGGF is the main instrument for providing stability and support for agriculture in the Community, and for financing the structural changes deemed necessary to improve the agriculture sector. This fund was specifically charged with aiding structural improvement in agriculture, reducing surpluses by subsidising exports to 3rd countries, and intervening in local markets by purchase when the price of products fall below the support level. The current framework for funding is pursuant to Regulation 1260/1999.⁵⁸

THE MAC SHARRY REFORMS

While the Uruguay round negotiations were nearing completion, the EC instigated what became to be known as the Mac Sharry reforms on Agriculture, after the then incumbent EC Commissioner for Agriculture. These

⁵⁴ [1970] OJ L No. 94/13.

⁵⁵ The EAGGF, or using its more common French acronyms, FEOGA.

⁵⁶ OJ No. 1962/992.

⁵⁷ R. Barents, *The Agricultural Law of the EC* (Kluwer Law International, 1994), Series: European Monographs Vol. 9.

⁵⁸ OJ 1999 L161/1.

reforms had very much an eye on the global negotiations on agriculture. The European Commission itself described changes in the CAP during the Mac Sharry reforms, as an effort to "separate more clearly two aspects of agricultural policy; that of economic efficiency, and that of social and environmental measures".⁵⁹ This approach was to be further developed by the 1999 reforms. Earlier moves in this direction were the Less Favoured Areas initiative in 1975,⁶⁰ and the Environmentally Sensitive Areas (ESA) programmes,⁶¹ which together constituted, in 1993, approximately 1% of the total UK agricultural budget.⁶²

The main effects of the later 1992 "Mac Sharry" CAP reforms were:⁶³

1. a reduction of intervention prices,⁶⁴ thus making the agricultural sector more, though as yet, not fully exposed, to the cold winds of the market place, and,
2. the introduction of new direct payments, to include the compensation through direct area payments,⁶⁵ subject to 15% rotational set-aside (in 1993 non-rotational set aside, at 18 or 21%, was introduced on an optional basis) for arable crops grown by all except small farmers, and an increase in the male bovine and suckler (beef) cow premiums subject to individual limits per holding and to regional reference herds sizes.⁶⁶

The most novel aspects of the 1992 reforms were the "accompanying measures", which for the most part were 50% funded (75% funded in Objective 1 regions) from the CAP budget. These "accompanying measures" were a myriad of provisions to include substantial funding

⁵⁹ European Commission Directorate General for Economic and Financial Affairs, "EC Agricultural Policy for the 21st Century", *European Economy: Reports and Studies*, No. 4 (European Commission, 1994).

⁶⁰ Directive on Mountain and Hill Farming in certain Less Favoured Areas, 75/268, OJ, 18, L128 (19 May 1975).

⁶¹ Council Regulation on Improving the Efficiency of Agricultural Structures, Official Journal, 28, L93, 1-18. (30 March 1985).

⁶² W. Howarth and C.P. Rodgers (eds.) in the Editorial to *Agriculture, Conservation and Land Use: Law and Policy Issues for Rural Areas* (Cardiff: University of Wales Press, 1993), quoting from *Ministry of Agriculture, Fisheries and Food, Agriculture in the UK*, 1988, HMSO, 1989.

⁶³ European Commission DG for Economic and Financial Affairs, "EC Agricultural Policy for the 21st Century: The 1992 CAP Reforms"; *European Economy Reports and Studies*, No. 4 (1994).

⁶⁴ 1/3 reduction in the cereal intervention price, 15% reduction in Beef, and the elimination of price support for oilseeds and protein crops.

⁶⁵ Based on historical base areas and regional yields.

⁶⁶ There were also extra "extensification" headage premiums if a producer reduced the stocking rate below 1.4 LU per fodder hectare.

of schemes to develop the disadvantaged areas of the European Union. Europe had been divided into objective areas under Article 8 Regulation (EEC) No. 4256/88,⁶⁷ with funding for the resulting Regional policy being found under the European Regional Development Fund (ERDF),⁶⁸ the European Social Fund, the Guidance Section of the EAGGF,⁶⁹ and the Cohesion Fund.⁷⁰ The LEADER programme started at this time,⁷¹ which was soon followed by LEADER II,⁷² and later LEADER+, with a view to developing a "Rural Europe".⁷³ The Regional Policy structure was altered during the 1999 reforms⁷⁴ when it was amended to cover three objective areas⁷⁵ and four community initiatives.⁷⁶ Pre-accession agricultural and rural development schemes, for central and eastern European countries are

⁶⁷ Objective 1: region whose development is lagging behind; Objective 2: industrial regions in decline; Objective 3: combating long term unemployment; Objective 4: adapting workers to industrial change; Objective 5(a): agricultural structures in all regions (Objective 5a provisions are often called "horizontal structural measures", as the entire Community is eligible. These provisions are exclusively financed by the EAGGF Guidance Section. Funding varied.); Objective 5b: rural development in certain limited areas; and Objective 6: Nordic regions, following the accession of the new member states.

⁶⁸ Currently operating under Council Regulation (EC) No. 1260/1999, laying down general provisions on the structural funds, OJ L 213, 13 August 1999.

⁶⁹ In the fisheries sector, the Fisheries Guidance fund was also available.

⁷⁰ Council Regulation (EC) No. 1260/99, laying down general provisions on the structural funds, OJ L 213, 13 August 1999.

⁷¹ The original LEADER scheme was instigated pursuant to Regulation (EEC) No. 4256/88, Article 8, DGVI Financing of the Common Agricultural Policy.

⁷² Whose objectives were (1) to ensure that support for exemplary local initiatives involving local development continues from Leader; (2) to support operations that are innovative, suitable as a model and transferable, and that illustrate the new directions that rural development may take; (3) to encourage the exchange of experiences and the transfer for know-how through a European rural development network; (4) to encourage transnational co-operation projects developed by the local bodies in rural areas which reflect their solidarity. See <http://www.rural-europe.acidl.be/>.

⁷³ See further <http://www.rural-europe.acidl.be/>.

⁷⁴ By Council Regulation (EC) No. 1260/99.

⁷⁵ Objective 1: Development and structural adjustment of regions whose development is lagging behind, on the basis that their per capita GDP was less than 75% of the Community average, (135.0 Billion Euro); Objective 2: Economic and social conversion of areas facing structural difficulties (22.5 Billion Euro); and Objective 3: Adaptation and modernisation of national policies and systems of education and training and employment (24.05 Billion Euro).

⁷⁶ Interreg III, covering cross-border, transitional and inter-regional co-operation, Urban, regeneration of urban areas in crisis, Leader+ rural development by local action groups, and Equal, to cover transnational co-operation to fight against discrimination and inequality in access to work; Article 20.1 1260/1999.

covered by SAPARD,⁷⁷ in addition to the more mainstream PHARE and ISPA⁷⁸ schemes.⁷⁹

Agri-development schemes were also developed under the Mac Sharry reforms, with the objective of encouraging more extensive, as opposed to intensive, means of production and to encourage the use of land for nature conservation and public leisure facilities. This scheme had many objectives, amongst them the reduction of the polluting effects of agriculture, the extensification of farming, the general improvement of the environment, the encouragement of the upkeep of abandoned farmlands and woodlands, the long term set-aside of land for environmental purposes, the encouragement of public access to land for leisure activities, and finally, the education and training of farmers so as to enable them to comply with the above requirements.

A scheme of aid for forestry investment and management, to include a scheme of compensation for income loss for up to 20 years, which included the "Community aid scheme for forestry measures in agriculture",⁸⁰ was introduced contemporaneously. This latter scheme had as its objective the conversion of agricultural land to forestry. It did not, however, include the growth of Christmas trees, which had become a popular pursuit in some Member States. A system of protection against forest fires was also introduced.⁸¹

The ageing population of farmers throughout the European Union had also been recognised as an obstacle to the preparation of the farming community for globalisation influences of the then anticipated WTO Agreement on Agriculture of 1994, and any subsequent developments. The encouragement of the transfer of farms to the next generation had been seen as a primary objective, with various forms of compensation for early retirement⁸² being introduced. These included lump sum or annual payments, for farmers and farm workers over 55, together with aid for

⁷⁷ Special Accession Programme for Agriculture and Rural Development.

⁷⁸ Instrument for Structural Policies for pre-Accession, which operates like the EC's Cohesion fund for existing EC member states.

⁷⁹ There are separate aid arrangements for Cyprus and Malta.

⁸⁰ Regulation No. 2080/92, of 30/6/92, OJ L 215 of 30/7/92, and Regulation No. 1054/94 of 5/5/94, OJ L 115 of 6/5/94, which organises financial control.

⁸¹ Regulation No. 2158/92 of 23.7.92 (OJ L 217 of 31/7/92), Regulation No. 1170/93 of 13/5/1993 (OJ L 118 of 4/5/93), Regulation No. 804/94 of 11/4/1994 (OJ L 93 of 12/4/94).

⁸² Regulation No. 2079/92 of 30/6/92, OJ L215 of 30/7/1992.

young farmers generally,⁸³ aid in vocational training,⁸⁴ and other forms of further education.⁸⁵ Measures to cover the management costs of young farmers during the first five years of operation were also covered⁸⁶ where the level of aid could have been quite high. This approach would be echoed in the later 1999 reforms, pursuant to Agenda 2000.

Special provisions had also been allowed for the particular difficulties facing farmers in mountainous regions, hill farms and less favoured areas.⁸⁷ Two types of aid were applicable in these areas: (1) compensation for permanent natural handicaps; and (2) joint investment aid. The EU contribution generally amounted to 25% of total financing, however, in Objective 1 areas and less favoured areas of Italy and Spain this could have risen to 50%, and even to 75% in some Objective 1 areas. New management tools were also provided for under these provisions, and aid for accounting on agricultural holdings⁸⁸ had also been provided.⁸⁹ General upgrading of market managing mechanisms⁹⁰ in pursuit of the reform of the CAP had been grouped in Objective 5a category of the Structural Fund

⁸³ "Objective 5a: aid for young farmers". The purpose of this aid for the take over of pre-existing movable and immovable assets, during the course of setting up of a young farmer. 25,000 young farmers benefit each year. Total available aid ECU 30,000 (all member states except UK and Netherlands).

⁸⁴ Nowadays used for courses to set up young people in agricultural holdings Max ECU 10,500 per person, of which ECU 4,000 for courses on the environment, forestry and reorientation of production, and granted only once in a lifetime. (All member states, except UK, have introduced national implementation measures).

⁸⁵ Regulation No. 2328/91 of 15/7/91 (OJ L 218 of 6/8/91), Article 28, amended by Regulation Nos. 3669/93 (OJ L 338 of 31/12/93) and Regulation No. 2843/94 (OJ L 302 of 25/11/94).

⁸⁶ Objective 5a: launching aid for mutual aid, replacement and management services. Regulation No. 2328/91 of 15/7/91 (OJ L 218 of 6.8.91), Articles 14 to 16 amended by Regulations 3669/93 (OJ L 338 of 31.12.93) and Regulation No. 2843/94 (OJ L 302 of 25/11/94).

⁸⁷ Directive 75/268/EEC of 28/4/75 (OJ L 128 of 19.5.75), Article 17 to 20 of Regulation No. 2328/91 of 15/7/91 (OJ L 218 of 6.8.91) amended by Regulation No. 2328/91 of 15/7/91 (OJ L 218 of 6.8.91) amended by Regulation Nos. 3669/93 (OJ L 338 of 31.12.93) and 2843/94 (OJ L 302 of 25.11.94).

⁸⁸ Regulation No. 2328/91 of 15/7/91 OJ L 218 of 6/8/91), Article 13, amended by Regulation No. 2843/91 (OJ L 302 of 25/11/94).

⁸⁹ Aid can vary from 700 to 1500 ECU. All Member States except Germany, Ireland, Luxembourg, Netherlands and UK have adopted national implementing provisions.

⁹⁰ Regulation No. 2085 of the 20/7/93 amending Regulation No. 4256/88 on the implementation provisions of Regulation No. 2052/88 with regard to the European Agricultural Guidance and Guarantee Fund (EAGGF) Guidance Section, OJ L 193 of 1993. Regulation No. 1282/94 of 2/6/94 laying down the rates of Community co-funding for certain measures of Objective 5a, OJ L 140 of 1994.

budget, and primarily concern the improvement of production conditions, processing and marketing of agricultural and forestry products.

Investment aid in agricultural holdings⁹¹ where funding in general could have amounted to 25% of the cost of improving competitiveness of a holding, in the context of rational and sustainable development of agricultural production while protecting the income of farmers, rising to 50% in disadvantaged areas of Spain and Italy, and up to 75% in Objective 1 areas. This funding was not limited to full time farmers. Funding could have included:

1. the construction of farm buildings,
2. the relocation of farm buildings when this is done in public interest,
3. land improvement operations,
4. environmental protection and improvement,
5. and on condition that this aid is granted in compliance with the general rules of competition.⁹²

Not only was the production of agricultural produce the concern of the European Union, so also was the processing and marketing of that produce,⁹³ with the objective being to relieve the intervention agencies. Marketing of produce was recognised as being of primary importance,⁹⁴ with a system to encourage the formation of producer groups and their unions.⁹⁵ Aid could have varied from 2 to 5% of value of market production, to a maximum of ECU 120,000.

Adding value to agricultural produce was seen as a way of increasing farm incomes through the market either through the encouragement of the

⁹¹ Regulation No. 2328/91 of 15/7/91 (OJ L 218 of 6.8.91), Articles 5 to 9, 11 and 12, amended by Regulations Nos. 3669/93 (OJ L 338 of 31.12.93) and 2843/94 (OJ L 302 of 25/11/94).

⁹² The UK ceased operating this scheme in 1995.

⁹³ Regulation No. 866/90 of 29/3/90 (OJ L 91 of 6/4/90) amended by Regulation No. 3669/93 (OJ L 388 of 31/12/93) Regulation No. 2843/94 (OJ L 302 of 25/11/94). (This regulation replaces Regulation No. 355/77, which concerned the Community aid scheme for investments in the field of processing and marketing agricultural and fisheries products).

⁹⁴ Objective 5a: launching aid for producer groups for marketing agricultural products; countries partaking in this scheme are Belgium, France, Spain, Greece, Ireland, Italy and Portugal.

⁹⁵ Regulation No. 1360/78 of 19/6/78 (OJ L 166 of 23.6.78) amended by Regulation No. 1760/87, 3875/88, OJ L 346 of 15.12.88), Regulation No. 3808/89 (OJ L 370 of 20.12.89), Regulation No. 3763/91 (OJ L 356 of 24.12.91), Regulation No. 698/93 (OJ L 74 of 27.3.93), Regulation No. 3669/93 (OJ L 338 of 31.12.93). In addition specific systems have been set up for the sector of fruit and vegetables (Regulation No. 1035/72 of 18/5/72 OJ L 118 of 20/5/72), for cotton (Regulation No. 389/82 of 15.12.82 OJ L 51 of 23/2/82) and for hops (Regulation No. 1696/71 of 26/7/91 OJ L 175 of 4/8/71).

growth of organic produce,⁹⁶ by creating conditions of fair competition, or through the new Community system of the designation of origin and geographical indication,⁹⁷ or the Community system for the protection of agri-food products benefiting from a certificate of specific character.⁹⁸ Public agencies and private bodies were targeted under Article 8 of the EAGGF Guidance Section.⁹⁹ This funding was designed to facilitate "pilot projects and demonstration projects relating to the adjustment of agricultural structure and the promotion of rural development".¹⁰⁰

With the European Union pouring all this money into agricultural schemes it was concerned that national initiatives would not unbalance its finely tuned aid package, and restrictions on national aid for investment in agricultural holdings has also been provided for.¹⁰¹ The informing of the European Citizen and the co-ordination of the various European rural initiatives was to be carried out by "European Rural Information and Promotion Carrefours".¹⁰² Processing and marketing structures were

⁹⁶ Regulation No. 2092/91 of 24/6/91 (OJ L 198 of 22/7/91) amended by Regulation No. 94/92 (OJ L 11 of 17/1/92), Regulation No. 1535/92 (OJ L 162 of 16/6/92), Regulation No. 2083/92 (OJ L 208 of 24/7/92), Regulation No. 3457/92 (OJ L 350 of 1/12/92), Regulation No. 3713/92 (OJ L 378 of 23/12/92), Regulation No. 2608/93 (OJ L 239 of 24/9/93), Regulation No. 468/94 (OJ L 59 of 3/3/94), Regulation No. 1468/94 (OJ L 159 of 28/6/94), Regulation No. 2381/91 (OJ L 255 of 1/10/94), Regulation No. 529/95 (OJ L 54 of 10/3/95), Regulation No. 1201/95 (OJ L 119 of 30/5/95), Regulation No. 1202/95 (OJ L 119 of 30/5/95), Regulation No. 1935/95 (OJ L 185 of 5/8/95). A list of bodies providing certification for the purpose of organic production is published in the OJ (OJ C 284 of October 1993).

⁹⁷ Regulation No. 2081/92 of 14/7/92 (OJ L 208 of 24/7/92), Regulation No. 1848/93 of 9/7/93 (OJ L 168 of 10/7/93), Decision No. 53/93 of 21/12/92 (OJ L 13 of 21/1/93), Decision No. 437/94 of 14/6/94 (OJ C 273 of 9/10/93). Communication from the Commission (OJ C273 of 9/10/93), completed by Regulation No. 2037/93 of 27/7/93 laying down the terms of application.

⁹⁸ Regulation No. 2082/92 of 14/7/92, relating to certificates of specific character of agricultural products and foodstuffs amended by Regulation No. 1848/93 and Regulation No. 2515/94 laying down terms of application of the preceding.

⁹⁹ Regulation No. 2085/93 of 20/7/93, Article 8, amending Regulation No. 4256/88 (OJ L 193 of 31/7/93). Article 8 deals with the application of Regulation No. 2052/88, OJ L 185 of 15/7/88, (relating to the missions of the EAGGF Guidance Section). See also Article 3 paragraph 3 sub-section 2 and Article 5 paragraph 2 point 3.

¹⁰⁰ Community contributions may be up to 75% of the cost of the project for Objective 1 regions and 50% for the other regions.

¹⁰¹ Regulation No. 2328/91 of 15/7/91 (OJ L 218 of 6/8/91), Article 12, amended by Regulations Nos. 3669/93 (OJ L 338 of 31.12.93) and 2843/94 (OJ L 302 of 25.11.94).

¹⁰² Established following the Communication of the Commission of the European Communities, *The Future of Rural Society*, published in 1988 (COM(88)5012 Final), implemented following to the Communication SEC(89)1717 final of 13/10/89 relating to the guidelines of rural development actions.

also encouraged and funded,¹⁰³ to encourage the development of new and higher quality products, to include organic products. This financing was aimed at persons or bodies who were ultimately responsible for the financing and investment in these schemes.¹⁰⁴

THE WTO AGREEMENT ON AGRICULTURE 1994

The WTO Agreement on Agriculture's first line of attack on the protectionist measures in operation in the various member states of the WTO, to include those in operation within the EC, was to calculate support measures. The concept of an Aggregate Measure of Support (AMS),¹⁰⁵ was adopted in the WTO agreement, which was a concept which evolved from the OECD's measurement of "Producer Subsidy Equivalent". The AMS is defined in Article 1(h) of the WTO text "as the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non product specific aggregate measurements of support and all equivalent measurements of support for agricultural products".¹⁰⁶ Agricultural Produce is defined in Article 2 as being any of the agricultural produce listed in Annex 1 to the WTO agreement. Member States of the WTO undertake in the Agreement on Agriculture and the schedules attached thereto to reduce their AMS by specific amounts on specific products.¹⁰⁷

¹⁰³ Regulation No. 866/90 of 29/3/90 (OJ L 91 of 6/4/90) amended by Regulation No. 3669/93 (OJ L 338 of 31/12/93) and Regulation No. 2843/94 (OJ L 3902 of 25/11/94). These replace Regulation No. 355/77, which concerned Community aid for investment in the fields of processing and marketing agricultural and fisheries products.

¹⁰⁴ Eligible investments:

1. the construction and acquisition of immovable property with the exception of land purchase,
2. new machinery and equipment, including computer software and programmes,
3. general costs (architects fees, consultants fees, feasibility studies) up to a ceiling of 12% of the cost referred to in the last 2 items. Generally speaking, the investment must concern Annex 2 products or fishery products. EU Contribution: The financial contribution from the EAGGF guidance section may not exceed 50% of the eligible costs in the regions covered by Objective 1 and 30% in other regions. Aid generally takes the form of capital grants.

All member states have introduced implementing legislation.

¹⁰⁵ Article 6 provides the terms of "aggregate measurement of support" and "annual and final bound Commitment Levels".

¹⁰⁶ *The Results of the Multilateral Round of Trade Negotiations: The Legal Texts.*

¹⁰⁷ The 1994 commitments in Agriculture under the WTO agreement were for developed countries to reduce, over a period of 6 years, their average tariffs on agricultural products

AMS, however, do not include specified domestic subsidies specified in Annex 2 to the Treaty Texts.¹⁰⁸ For the most part these Annex 2¹⁰⁹ subsidies are domestic support measures that have little effect on trade or production. Programs which, however, provide "services or benefits to agriculture or the rural community" are also exempt¹¹⁰ as long as they do not involve direct payments to producers or processors. Other schemes that are not included for AMS purposes include schemes for:

1. public stockholding for food security purposes;
2. domestic food aid;
3. direct payments to producers;
4. decoupled income support;
5. governmental financial participation in income insurance and income safety net programs;
6. payment for relief from natural disasters;
7. structural adjustment assistance provided through producer retirement programs;
8. structural adjustment assistance provided through resource retirement programs;
9. structural adjustment assistance provided through investment aids;
10. payments under environmental programs;
11. payments under regional assistance programs.

by 36%, with a minimum cut per product of 15%. The equivalent figures for developing countries was, over a period of 10 years, a reduction in tariffs for agricultural products of 24%, with a minimum cut per product of 10%. Aggregate measures of support were to be reduced, for the same time periods, by developed countries, by 20%, and developing countries, by 13%, with subsidies on exports to be reduced by developed countries by 36% over six years, with subsidised quantities being reduced by 21%, and for developing countries, a reduction over 10% of 24% for export subsidies, with a reduction in subsidized quantities of 14%. Least developed countries were not required to reduce tariffs or subsidies. See *Agriculture Negotiations: Background*, at <http://www.wto.org>.

¹⁰⁸ A member shall not be required to include in the calculation of its Current Total AMS does not include support if the payment is (i) product specific support if it does not exceed 5% of the value of production of that commodity, and (ii) non product specific support where it does not exceed 5% of the value of the country's total agricultural production. Article 6(4)(a). for developing countries the de minimis level is 10% and specified agricultural input subsidies are excluded from the AMS (Articles 6.2 and 6.4).

¹⁰⁹ WTO Agreement on Agriculture, Article 21 provides that the annexes to the GATT texts are to form an integral part of the agreement.

¹¹⁰ These include research, pest and disease control, training services, extension and advisory services, marketing and promotion services, and infrastructure services, inspection services, environmental and conservation programmes, resource and producer retirement programs, stockholding for food security, domestic food aid, crop insurance, disaster relief, regional aids, and structural investment aid.

These domestic support policies which are deemed not to distort trade are referred to by trade negotiators as "Green Box" provisions, and are thereby exempt from the AMS reduction¹¹¹ commitments set out in Article 4.2.

Some environmental aids are also exempt from the Article 4.2 reduction commitment, usually if the payments are connected with efforts of the domestic government to withdraw agricultural land and resources from production.¹¹² Further exemptions from Article 4.2 obligations are available under Annex 5 where Member States agree not to "maintain, resort to, or revert to any measures of the kind which have even required to be converted into ordinary customs duties in respect of primary agricultural products, subject to special treatment reflecting factors of non-trade concerns, such as environmental protection".¹¹³

The recommendations in the GATT documents regarding internal support are:

1. reduce current levels of domestic support by 50% from a base year of 1988,
2. base reductions in internal support on an Aggregate Measure of Support (AMS), provided that
 - (i) reductions in AMS are accompanied by cuts in export subsidies and
 - (ii) support is not increased for any product (i.e. no rebalancing).¹¹⁴

The agreement is actually to reduce AMS, by equal annual instalments, by 20%, from the 1986–1988 levels, over 6 years.

No subsidies can be granted by Member States that are not specified in the Treaty Texts,¹¹⁵ unless provided for by paragraphs 2(b) and 4 of Article 9, and the maintenance of the current levels of AMS (i.e. no increase), is maintained in Article 7. This distinction of AMS and non-AMS payments has been noted as an opportunity by all Member Countries, not just the US and the EU, to restructure their Agricultural support programs towards income supplements, and away from direct production subsidies.¹¹⁶ Annex 3 specifies how to calculate the Aggregate Measurement of Support, and Annex 4 the Equivalent Measurement of Support. Producer limiting programs are also given a protected status, as long as the payments are to be based on fixed yields and area, or the payments are to be paid on 85% or

¹¹¹ WTO Agreement on Agriculture, Article 6.1.

¹¹² WTO Agreement on Agriculture, Annex 2.

¹¹³ K. Kummer, "The General Agreement on Tariffs and Trade in 1994", *Yearbook of International Environmental Law*, p. 609.

¹¹⁴ J.J. Schott assisted by J.W. Burman, *The Uruguay Round: an Assessment* (Institute for International Economics).

¹¹⁵ WTO Agreement on Agriculture, Article 3(3).

¹¹⁶ Op. cit., footnote 114.

less of production, any livestock payments to be based on a fixed number of head of cattle. If these criteria are met then such payments will not be included in the calculation of AMS.¹¹⁷

THE 1999 CAP REFORMS

The CAP underwent further reform pursuant to Agenda 2000,¹¹⁸ which was a Commission proposal of July 1997, which was adopted by the Berlin European Council in March 1999. Agenda 2000 had as its aim, in line with undertakings given in the WTO Agreement on Agriculture, and with the view to the subsequent WTO agricultural negotiations, the reduction of "guaranteed prices", which were to be compensated by an increase in direct support to farmers.¹¹⁹ This was to be complimented by measures to promote the development of "substitute jobs and other sources of income for farmers", together with the "formation of a new policy for rural development, which becomes the second pillar of the CAP".¹²⁰ It could be argued that the CAP, allied with the Regional policy, and the operation of the LEADER and LEADER II schemes had already made efforts in this direction, however, Agenda 2000 had repositioned these activities to the fore, within the overall CAP strategy. In addition to redesigning the CAP into a two pillar structure, Agenda 2000 emphasised the need to integrate "more environmental and structural considerations into the CAP",¹²¹ thereby furthering the move from a prices policy to a structural policy earlier referred to in this chapter. Food quality and safety were also made a priority, with the overall objective of Agenda 2000 being to develop the "multi-functional, sustainable and competitive agriculture" of the EU.¹²²

Future agricultural legislation was to be simplified, consolidated, and made available to the public on the internet.¹²³ For example, rural development provisions were consolidated into a single regulatory framework¹²⁴

¹¹⁷ WTO Agreement on Agriculture, Article 6(5).

¹¹⁸ AGENDA 2000 <http://www.europa.eu.int/scadplus/leg/en/lvb/104000.htm>.

¹¹⁹ European Parliament *Briefing No. 27; Agriculture and Enlargement*, DOC EN/EV/360/360464.

¹²⁰ *Supra* n. 118.

¹²¹ *Supra* n. 118.

¹²² *Supra* n. 118.

¹²³ See *Report from the Commission to the European Parliament and the Council on Simplification of Agricultural Legislation*, Brussels, 29.01.2001 COM (2001) 48 Final.

¹²⁴ Council Regulation (EC) No. 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and

from "the previous nine regulations".¹²⁵ Simplifications also resulted from the "reduction to three of the number of objectives for structural measures".¹²⁶ Other simplifications resulted from the "Small Farmers' Scheme" payments structure.¹²⁷ In line with this process of simplification, the horizontal regulations on import and export licences were consolidated into Commission Regulation (EC) No. 1291/2000,¹²⁸ which included much simplification.¹²⁹ This was to be accompanied by new "Community Guidelines for State aid in the agricultural sector",¹³⁰ which were complimented by the EC's own regulations; Council Regulation (EC) No. 1259/1999 of 17 May 1999 establishing common rules for direct support schemes under the Common Agricultural Policy,¹³¹ and Council Regulation (EC) No. 1244/2001 of 19 June 2001, amending Regulation 1259/1999 establishing common rules for direct support schemes under the common agricultural policy, for farmers receiving small amounts of money.¹³²

The guidelines on state aids, which came into force on the 1st January, 2000, provided that certain state aids would be approved subject to certain conditions. These approved state aids included; investment aid for farms,¹³³ with higher level of aids being available for "investments linked to the conservation of traditional landscapes, for the relocation of farm buildings in the public interest or for the improvement of the environment, animal welfare or hygiene".¹³⁴ Aid was approved for "investment in the processing and marketing of agricultural products",¹³⁵ as were state aids

repealing certain regulations; Commission Regulation (EC) No. 1750/1999 of 23 July 1999 laying down detailed rules for the application of Council Regulation (EC) No. 1257/1999 on support for rural development from the EAGGF; Commission Regulation (EC) No. 2603/1999 of 9 December 1999 laying down rules for the transition to the rural development support provided for by Council Regulation (EC) No. 1257/1999.

¹²⁵ *Supra* n. 123.

¹²⁶ *Supra* n. 123.

¹²⁷ *Supra* n. 123.

¹²⁸ OJ L. 152, 24/6/2000, p. 1.

¹²⁹ *Op. cit.*, footnote 119.

¹³⁰ OJ C 28, 1.1.2000, p. 2; OJ C 232, 12.8.2000, p. 19.

¹³¹ OJ L. 160, 26/6/1999, p. 113.

¹³² OJ L 1973, 27.6.2001, p. 1, second recital.

¹³³ Introduced by Council Regulation (EC) No. 1257/1999 OJ L 106, 26/6/1999, p. 80, at Article 4.

¹³⁴ *The Agricultural Situation in the European Union 2000 Report*, Brussels, 11.02.2002, COM (2002) 67 final.

¹³⁵ *Supra* n. 134.

to support agri-environmental undertakings.¹³⁶ Aid was also approved to compensate for less-favoured areas,¹³⁷ to help young farmers start up,¹³⁸ to assist in early retirement schemes, or to reduce production, processing or marketing capacity. Also included was aid to help producer groups start up, to compensate for loss arising from natural disasters, adverse weather conditions or disease, or aid towards insurance against these risks, or aid to improve marketing of goods, or the genetic quality of livestock, or aid for "the outermost regions and the Aegean islands."¹³⁹ Specifically, Article 33 of Council Regulation (EC) No. 1257/1999¹⁴⁰ provided support for the promotion and adaptation and development of rural areas, to include "land improvement, reparation, setting-up of farm relief and farm management services", the marketing of quality agricultural products, the provision of basic services to rural areas, "renovation and development of villages and protection and conservation of the rural heritage", the "diversification of agricultural activities and activities close to agriculture to provide multiple activities or alternative incomes", and "the encouragement of tourist and craft activities".¹⁴¹ Common rules for direct support schemes set out in 1999,¹⁴² were amended in 2001.¹⁴³ The Structural funds had been dealt with by Regulation 1269/1999,¹⁴⁴ which had provided that Objective 1 funding was to be covered by the ERDF, the ESF, the EAGGF Guidance section and, where appropriate, the FIFG,¹⁴⁵ Objective 2 funding from the ERDF and the ESF, and Objective 3 from the ESF.¹⁴⁶ The financing of the four community initiatives was also provided for in Regulation 1260/1999.

¹³⁶ Introduced by Council Regulation (EC) No. 1257/1999 OJ L 106, 26/6/1999, p. 80, at Article 22.

¹³⁷ *Supra* n. 136.

¹³⁸ *Supra* n. 136, at Article 8.

¹³⁹ *Supra* n. 134.

¹⁴⁰ Council Regulation (EC) No. 1257/1999 OJ L 106, 26/6/1999, p. 80.

¹⁴¹ *Supra* n. 140.

¹⁴² Council Regulation (EC) No. 1259/1999 of 17 May 1999 establishing common rules for direct support schemes under the common agricultural policy. Official Journal L 160, 26/06/1999 p. 113.

¹⁴³ Council Regulation (EC) No. 1244/2001 of 19 June 2001 amending Regulation (EC) No. 1259/1999 establishing common rules for direct support schemes under the common agricultural policy, Official Journal L 173, 27/06/2001 p. 1.

¹⁴⁴ Council Regulation (EC) No. 1260/99, laying down general provisions on the structural funds, OJ L 213, 13 August 1999.

¹⁴⁵ The Financial Instrument for Fisheries Guidance, which is to "contribute to structural actions in the fisheries sector Objective 1 regions in accordance with Council Regulation (EC) No. 1263/1999 June 1999 on the financial instrument for fisheries guidance". Article 2.3 Regulation 1260/1999.

¹⁴⁶ Regulation 1260/1999, Article 2.2.

INTERREG and URBAN were both to be financed by the ERDF, Leader was to be financed by the EAGGF Guidance Section, and EQUAL by the ESF.¹⁴⁷

The reduction in guaranteed prices aspect of the reform was reflected in the reduction of the intervention price for cereals by 20% in 2000, with direct aid increased from ECU 54 per tonne to ECU 65 per tonne.¹⁴⁸ In the Beef and veal common organisation, support was to be reduced by 30% in three equal phases, with the then existing intervention system being replaced by a private storage system. In like manner, the intervention prices for butter and skimmed milk powder was to be reduced by 15% in four phases, with similar provision being made for other agricultural products.¹⁴⁹

AN EXAMINATION OF THE CEREALS' COMMON MARKET BEFORE AND AFTER THE MAC SHARRY REFORMS

An example of one of the more developed market organisations is that of Cereals,¹⁵⁰ which was set up against the backdrop of the International Wheat Agreement, and which is managed by the Management Committee for Cereals.¹⁵¹ Its objective was to have a single price system for cereals for the community, but maintaining a flexibility to vary target prices, intervention prices and threshold prices a number of times a month, if necessary.¹⁵² In the market for Cereals¹⁵³ a target price, and threshold price and intervention price is set for "a standard quality" of each cereal.¹⁵⁴ How these prices are used differs between the two regulations. The 1975 regulations specified that the Agricultural Commission was to submit to the Council

¹⁴⁷ Regulation 1260/1999, Recital No. 38.

¹⁴⁸ *Supra* n. 134.

¹⁴⁹ *Supra* n. 134.

¹⁵⁰ Pre Mac Sharry reforms Regulation No. 2727/75 [1995], OJ L No. 281/1, which consolidated and updated the previous regulations, but which was repealed and replaced by Council Regulation (EEC) no 1766/92 of 30 June 1992 on the common organisation of the market in cereals, OJ L 181, 1.7.92, p. 21. The exact products covered by this regulation are set out in Article 1 of both regulations. The 1992 regulation operates in conjunction with Regulation (EEC) No. 1765/92 on assistance for arable farmers, Article 1.2 of Council Regulation (EEC) No. 1766/92.

¹⁵¹ Council Regulation (EEC) No. 1766/92, Article 23, as amended by Council Regulation (EC) No. 1666/2000, Article 1.3, of the 17 July 2000, Official Journal L 193, 29/07/2000 p. 1.

¹⁵² Regulation 2727/75, Article 6, and Council Regulation (EEC) No. 1766/92, Article 3.4 and Article 6.

¹⁵³ Being common wheat, durum wheat, barley, maize, sorghum and rye.

¹⁵⁴ Council Regulation (EEC) No. 1766/92, Article 3.

a schedule of prices for various cereals such as wheat, meslin, rye, barley, oats, maize, buckwheat, millet, canary seed, and grain sorghum and prices for a series of processed products such as meal, flour, and groats.

The target price under the 1975 regime was to be fixed for Duisberg in the Rhür, the centre in shortest supply, however the guaranteed minimum price is for the "marketing centre of the region with the largest surplus".¹⁵⁵ This target price was then to represent the optimum level for domestic prices.¹⁵⁶ Wheat was then treated as the basic cereal in pricing discussions of marketing organisations and corn, sorghum¹⁵⁷ and millet, essentially feed grains, are priced on a conversion ratio related to wheat. The feed grain rates were then to contribute to the calculation of the target price for the meat of animals which would be fed on said grains. The wheat target price then affected the target price of a number of other agricultural products, not just grains. The preamble of the 1992 regulation states that the "current policy" on cereals should be "radically reformed". The pricing mechanism to be used was to lead to "market equilibrium", with the Community achieving a "better competitive position" globally, to be achieved by way of the "lowering of the target price to a level representing an anticipated rate on a stabilised world market". It is interesting to note that the preamble states that "so as not to encourage producers to opt for one particular crop, the target price should be the same for the major cereals". This is a major change in approach to that used in the 1975 regulation. Regulation 1766/92 went on to provide one target price for all cereals until the marketing year 1995/96 under Article 3.1.

The 1975 regulation provided a uniform intervention price for barley, maize, common wheat¹⁵⁸ and durum wheat, which was fixed for Ormes, France, the area of greatest supply, represented the minimum market price, at which intervention agencies are obliged to purchase. The intervention prices were to be "valid for all Community intervention centres designated for each cereal".¹⁵⁹ The 1992 approach to intervention price is to provide one intervention price for all cereals, under Article 3.2 of Regulation 1766/92.

A threshold price was also provided for under both the 1975 and 1992 regulations. This was the minimum entry price for third country imports,

¹⁵⁵ Regulation 2727/75, Article 2(3).

¹⁵⁶ F.G. Snyder, *Law of the Common Agricultural Policy* (London: Sweet and Maxwell, 1985).

¹⁵⁷ S. Andrews, *Agriculture and the Common Market* (Ames: Iowa State University Press, 1973).

¹⁵⁸ Together with a derived intervention price for common wheat, Regulation 2727/75, Article 4.

¹⁵⁹ Regulation 2727/75, Article 3.4.

the difference in prices being made up by a variable "import" levy which is paid into the Guarantee and Guidance Fund, referred to above. This import levy could have varied from day to day, and was fixed "on the basis of the day from which the imported goods exercise an influence of the internal market of the Community, that is to say, the date on which they finally reach this market and enter into competition with domestic products".¹⁶⁰ In 1975, in an effort to expose prices more to market forces than previously applied, and recognising that some, at least, of the grains were *inter se* substitutable, a common intervention price for feed grains was introduced under the "silo system".¹⁶¹ However in an effort to promote wheat of a standard suitable for bread making a special reference (floor) price was introduced for same. Intervention agencies are required to purchase, at intervention price, any cereals offered to them (except for Maize). Arrangements were made by way of carry over payments to prevent end of year rushes to sell grains to intervention agencies, in the fear perhaps that the following year's intervention price might be lower. Under the 1992 regulation the one threshold price was fixed for all cereals,¹⁶² reflecting the inter-changeability of cereals from the point of view of the farmer, with the c.i.f. price continuing to be based on the Rotterdam prices, "on the basis of the most favourable purchasing opportunities on the world market".¹⁶³ A levy was then imposed on imported cereals, equal to the threshold price less the c.i.f. price.¹⁶⁴ The use of the Rotterdam prices thereby increased the levy payable. In addition to the payment of the levy, all imports into the EC, as with all exports from the EC, required a licence.¹⁶⁵ Under Annex I of Council Regulation (EC) No. 3290/94,¹⁶⁶ which was enacted in order to implement the WTO Agreement on Agriculture Article 3.2 of Council Regulation (EEC) no. 1766/92 was deleted, thereby bringing to an end the regime of threshold prices in the cereals sector within the EC.

Article 16 of the 1975 Regulation and Article 13 of the 1992 Regulation deal with the exportation of produce out of the European Community.

¹⁶⁰ Case 35/71 *Schleswig-Holsteinische landwirtschaftliche Hauptgenossenschaft GmbH v. Hauptzollamt Itzehoe* [1971] E.C.R. 1083.

¹⁶¹ Regulation 2727/75.

¹⁶² Regulation 1766/92, Article 3.2.

¹⁶³ Regulation 1766/92, Article 10.2, and Regulation 2727/75, Article 13 and 14.

¹⁶⁴ Regulation 1766/92, Article 10.1, with the exception of Rye, which had its own calculations.

¹⁶⁵ Regulation 2727/75, Article 12, and Regulation 1766/92, Article 9.

¹⁶⁶ Council Regulation (EC) No. 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations, Official Journal L 349, 31/12/1994 p. 105.

The difference between world market prices of quotations, normally lower than Community prices, may be covered by an export refund. The refund payment was made depending on the country of export, but may vary according to the country of destination under the 1975 Regulation.¹⁶⁷ Under the 1992 regulation, the "refund shall be the same for the whole Community", but may "be varied according to use or destination".¹⁶⁸ The granting of this export refund under the 1975 regulations was dependent on the desire of the community to retain manufacturing jobs in the community, and to export processed goods rather than raw materials. Inward processing arrangements may also have been restricted or prohibited.¹⁶⁹ This would nowadays be subject to the EC's obligations under the GATT/WTO agreements, and has been replaced pursuant to Annex I of Council Regulation (EC) No. 3290/94,¹⁷⁰ which operated to delete Title II of Council Regulation (EEC) No. 1766/92, and its replacement by a new Title II which was drafted to comply with WTO – Uruguay round commitments. Power is reserved under both regulations to the Community to take what ever measures are necessary in the event of serious disturbances, of the threat of same, which may endanger the objectives set out in what is now Article 33¹⁷¹ of the Treaty of Rome.¹⁷² Said disturbances are not specified.

The 1992 cereals' regulation was accompanied by Council Regulation (EEC) No. 1765/92,¹⁷³ which establishes a support system for producers of certain arable crops, on the basis of both rotational and non-rotational set aside. Council Regulation (EEC) No. 1765/92 has since been repealed and replaced by Council Regulation (EC) No. 1251/1999.¹⁷⁴ Council Regulation 1251/1999 provides a support mechanism for producers of certain arable crops. It provides in recital no. 7 that "reform of the support scheme has to take into account the international obligations of the community", namely the WTO Agreement on Agriculture obligations. It also provides in recital no. 8 that "the best way to achieve market balance is to approximate the Community prices of cereals to the prices on the world market and the provide for non-crop specific area payments". The WTO Agree-

¹⁶⁷ Regulation 2727/75, Article 16 (2).

¹⁶⁸ Regulation 1766/92, Article 13.2.

¹⁶⁹ Regulation 2727/75, Article 17.

¹⁷⁰ Council Regulation (EC) No. 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations, Official Journal L 349, 31/12/1994, p. 105.

¹⁷¹ Ex. EC Treaty, Article 39.

¹⁷² Regulation 2727/75, Article 20, and Regulation 1766/92, Article 17.

¹⁷³ OJ L 181, 1/7/1992, p. 12.

¹⁷⁴ Council Regulation (EC) No. 1251/1999 of 17 May 1999 establishing a support system for producers of certain arable crops, Official Journal L 160, 26/06/1999, p. 1.

ment on Agriculture which EC CAP provisions are mirroring provide for green box exemptions¹⁷⁵ and blue box exclusions.¹⁷⁶ The Green box provisions permit¹⁷⁷ “payments under environmental and regional assistance programmes”.¹⁷⁸ Payments under Green Box provisions, must be generally available to producers within the region¹⁷⁹ and can not be “related to, or based on, the type or volume of production”,¹⁸⁰ with the “size of the payment related to the income loss incurred” and not on current behaviour,¹⁸¹ thereby limiting the effectiveness of developing green box payments as steering mechanisms in the development of more sustainable agricultural practices.¹⁸²

THE CURRENT SITUATION

As stated earlier, the WTO negotiations on Agriculture have reopened pursuant to Article 20 of the Agreement on Agriculture. Some of the negotiating parties have viewed the negotiations as a “tripod” structure, of “export subsidies, domestic support, and market access”, with others viewing the negotiations as being a “pentangle”, the five points being the above three, together with “non-trade concerns and special and differential treatment for developing countries as separate issues in their own right”.¹⁸³ The issue of rural development has given rise to one of the lengthiest discussions to date at this round.¹⁸⁴ The EC is emphasising the rural development aspect of Agriculture, in light of its recent restructuring of agricultural production within the EC¹⁸⁵ into a two pillar structure, with an evolving Rural policy forming the second pillar.¹⁸⁶ Terms such

¹⁷⁵ Agreement on Agriculture, Article 6.1 and Annex 2.

¹⁷⁶ Agreement on Agriculture, Article 6.

¹⁷⁷ Agreement on Agriculture, Articles 2.2-2.13.

¹⁷⁸ K.C. Kennedy, “Reforming Farm Trade in the Next Round of WTO Multilateral Trade Negotiations”, *Journal of World Trade* 35/6 (2001), pp. 1061–1079.

¹⁷⁹ James Rude, “Under the Green Box; the WTO and Farm Subsidies”, *Journal of World Trade* 35/5 (2001), pp. 1015–1033.

¹⁸⁰ WTO Agreement on Agriculture, Annex 2, paragraph 6.

¹⁸¹ *Supra* n. 179.

¹⁸² *Supra* n. 179.

¹⁸³ *WTO Agriculture negotiations The issues, and where we are now*, 25th January 2002, <http://www.wto.org>, at p. 12.

¹⁸⁴ *Supra* n. 183.

¹⁸⁵ J.A. McMahon, *Law of the Common Agricultural Policy* (Pearson Education, 2000), at p. 120.

¹⁸⁶ *The Agricultural situation in the European Union 2000 Report*, Brussels, 11.02.2002, COM (2002) 67 final and Agenda 2000. <http://www.europa.eu.int/scadplus/leg/en/lvb/104000.htm>.

as "sustainability" which has received international recognition through the Brundtland commission,¹⁸⁷ and "multifunctionality", which has yet to achieve an internationally recognised definition, though the OECD's positive concept of multifunctionality is the most likely to be adopted,¹⁸⁸ are coming to the fore in the EC's approach to the current WTO negotiations,¹⁸⁹ along with the EC's own Agenda 2000 package of reforms.¹⁹⁰ Many of the WTO member states have accepted that that agriculture is not just about food and fibre production, and that it has other functions, however "although some dislike the buzzword 'multifunctionality' ".¹⁹¹ It remains to be seen if the Agenda 2000 reforms of the CAP will be sufficient to meet the requirements of a new WTO Agreement on Agriculture, or whether further radical restructuring of the CAP will be required, as was the case in order to meet the EC's legal requirements under the 1994 WTO Agreement on Agriculture.

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¹⁸⁷ OECD, *Policies to Enhance Sustainable Development* (OECD 2001), quoting from WECD, (World Commission on Environment and Development) *Our Common Future* (Oxford: Oxford University Press, 1987).

¹⁸⁸ OECD, *Multifunctionality: Towards an Analytical Framework* (OECD, 2001).

¹⁸⁹ "It is essential that the sustainability and multifunctionality principles underpin – and become the norm in – future world agricultural trade negotiations." Opinion of the Committee of the Regions on: the 'Proposals for Council Regulations (EC) concerning the reform of the common agricultural policy': 'Council Regulation (EC) on the financing of the common agricultural policy'; 'Council Regulation (EC) amending Regulation (EEC) No. 1766/92 on the common organisation of the market of cereals and repealing Regulation (EEC) No. 2731/75 fixing standard qualities for common wheat, rye, barley, maize and durum wheat'; 'Council Regulation (EC) establishing a support system for producers of certain arable crops'; 'Council Regulation (EC) on the common organisation of the market in beef and veal'; 'Council Regulation (EC) on the common organisation of the market in milk and milk products'; 'Council Regulation (EC) amending Regulation (EEC) No. 3950/92 establishing an additional levy in the milk and milk products sector'; 'Council Regulation (EC) establishing common rules for direct support schemes under the common agricultural policy'; 'Council Regulation (EC) on support for rural development from the European Agriculture Guidance and Guarantee Fund (EAGGF)' CdR 273/98 fin, Official Journal C 93, 06/04/1999 p. 1.

¹⁹⁰ Op. cit., footnote 118.

¹⁹¹ Op. cit., footnote 183.

Agriculture, the EC and the WTO: a legal critical analysis of the concepts of sustainability and multifunctionality

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Abstract The agricultural policies of the Member States of the EC have for many years now been controlled from Brussels under the Common Agricultural Policy (CAP). In recent years the CAP has, together with other policies of the EC, been refocused from crop production support to a European rural policy, with the term 'sustainability' being written into many policy documents. This term has achieved international recognition and the definition used by the Brundtland Commission has been widely accepted, as evidenced by its use in OECD documentation. While the term 'sustainability' has been written into World Trade Organisation (WTO) texts, the robustness of the term is questionable. The question then arises as to the legal interaction of WTO texts and multilateral environmental agreements, which do have 'sustainability' as their core philosophy. A new term has entered the regional and global debate in the policy area of agriculture, that of 'multifunctionality'. The EC is increasingly defining agriculture as being multifunctional. This term has yet to be clearly defined at EC level, although the OECD has done some work in this area. How the millennium round of WTO negotiations reacts to the term 'multifunctionality' will have an important impact on the EC's CAP. This paper examines the issues of sustainability and multifunctionality, with particular reference to the agricultural policies of the EU and WTO, and their interaction.

INTRODUCTION

National agricultural policy is no longer the preserve of national governments. In most western European countries national agricultural policies have been largely controlled by the regional governance structure of the EC. In addition, agriculture is increasingly becoming a bone of contention in international trade disputes. This was evidenced in the fact that the whole of the General Agreement on Tariffs and Trade (GATT) under the Uruguay round of negotiations was held up pending the resolution of agricultural trading issues between the three main negotiating parties at the international level, the EC, the USA and the Cairns group. Resolution was eventually reached at Blair House in November 1992. Conflicting issues of feeding an increasing global population, at a reasonable price, while maintaining our respective biodiversities, local ecosystems and rural populations, are continuing issues of debate. Differences in social priorities in different areas around the world will increasingly have an impact on the international debates on agriculture in this increasingly globalised world. The agricultural policy of the EC will be strongly influenced by WTO agricultural agreement commitments. In-depth examination of the interaction of the agricultural policy of the EC and the WTO is merited. For the purposes of this paper, I propose, however, to focus on the interaction between these two levels of governance, and to limit my examination to their approaches, together with the views of the OECD, to the issues of sustainability and multifunctionality, and then to analyse the possible impact of any divergence on agricultural policy.

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EC—LEGAL ARTICULATION WITH THE WTO

The EC is unusual in that it is the only regional integration association (RIA) currently recognised as a member of the WTO;¹ however, a full elaboration of the relationship remains outstanding.² In Opinion 1/94³ the ECJ held that the Common Commercial Policy of the EC currently enshrined in Article 133 EC⁴ entitled the Commission to develop an external Common Commercial Policy,⁵ with the Common Agricultural Policy being allied with the Common Commercial Policy. Matters such as the General Agreement on Trade in Services (GATS)⁶ and the Agreement on Trade Related Aspects of Intellectual Property (TRIPs)⁷ were held to be outwith the delegated powers of the EC, and remained in the exclusive competence of the EC Member States. EC Regulation 1600/95,⁸ as amended by Regulation 1170/96,⁹ went on to incorporate the WTO Agreement on Agriculture into EC law.¹⁰

ECJ jurisprudence recognises that the EC was substituted for the Member States with regard to commitments under the GATT as far back as on 1 July 1968, when the EC introduced its Common Customs Tariff.¹¹ The ECJ has taken upon itself the role of interpreter of the GATT by way of preliminary ruling under Article 234 EC,¹² with regard to issues arising as and from that date (1968).¹³

In 1972 the ECJ recognised that the provisions of GATT 1947 were binding on the Community.¹⁴ However, it was indicated in the same case that in order to determine the issue of whether or not an EC provision was illegal because it was in breach of a public international law obligation, it was necessary to establish (1) that the public international obligation was binding on the Community, and (2) where the proceedings were before a national court, that the rule was self-executing.¹⁵ Regard must also be had to the 'spirit, the structure and the terms of the convention'.¹⁶ In 1972 it was found that, because there was great flexibility in the earlier

1. Whether it is the EC, or its constituent Member States, which vote at WTO meetings is an internal matter for the EC.
2. Frederick M. Abbott, *Law and Policy of Regional Integration: The NAFTA and Western Hemispheric Integration in the World Trade Organization System*, (Martinus Nijhoff: Dordrecht/London, 1997) at 32.
3. Opinion 1/94 of 15.11.1994. Opinion pursuant to Art. 228(6) of the EC Treaty. ECJ [1994] 5267.
4. Article 113 EC, pre-Amsterdam.
5. Introducing the concept of implied parallel powers into EC jurisprudence. See A. Appella, 'Constitutional Aspects of Opinion 1/94 of the ECJ concerning the WTO' (1996) 45 ICLQ 440.
6. While the cross-border direct supply of services was analogous to the trade in goods and therefore part of the Common Commercial Policy, the rest of the modes of the supply of services regulated by GATS, i.e. consumption abroad, commercial presence and the presence of natural persons, exceeded the limits of Art. 113 EC and the Common Commercial Policy, Opinion 1/94 (case comment) Christopher Vedder and Hans-Peter Folz, (1996) 7(1) EJIL 131-4 at 131.
7. Article 113 only covered the provisions of TRIPs dealing with the fight against the release of counterfeit goods into free circulation, since these related to measures taken by Customs authorities at the external frontiers of the Community. Intellectual property rights did not relate specifically to international trade: *ibid.*
8. OJ L151 1.7.1995, 12.
9. OJ L115 28.6.1996, 10.
10. G. McFarlane, 'Butter Matters', (1998) 460 *Tax Journal* 21-2.
11. Joined Cases 267-269/81 *Annenistrasione delle Finanze dello State v Societa Petrolifera Italiana SpA (SPI) and SpA Michelen Italiana (SAMI)* (reference for a preliminary ruling from the *Corte Suprema di Cassazione*) [1982] ECR 801.
12. Article 177 EC, pre-Amsterdam.
13. Above n. 11.
14. Cases 21-24/72 *International Fruit Company NV and others v Productschap Voor Groenten en fruit (No. 3)* [1972] ECR 1219.
15. *Ibid.*
16. *Ibid.*

GATT, it was considered that the particular part of GATT in question at the time was not self-executing. Such an argument would not be as persuasive with regard to the GATT 1994. The ECJ has yet to overturn a provision of EC law on the basis that it is incompatible with GATT rules;¹⁷ however, Council Decision 94/800¹⁸ 'stated that by its nature, the Agreement establishing the World Trade Organisation, including the annexes thereto, is not susceptible to being directly invoked in Community or Member States Courts'. The ECJ in *Commission v Germany*¹⁹ stated that 'the primacy of international agreements concluded by the Community over provisions of secondary legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements'.²⁰

As neither the World Trade Organisation nor GATT is expressly referred to in the EC Treaty,²¹ the relationship between the two organisations, in the context of EC jurisprudence, has been developed by way of case law of the ECJ. Article 302 EC²² does empower the European Commission to 'maintain such relations as are appropriate with all international organisations'. European law requires the EC to adhere to all of its international law commitments, with 'the provisions of such an agreement' being deemed to form 'an integral part of the community system',²³ and an obligation being placed on the ECJ to ensure the 'uniform application' of the terms of such agreements 'throughout the Community'²⁴ in order to ensure that they are not used to create barriers to trade.

THE EC VIEW OF SUSTAINABILITY AND MULTIFUNCTIONALITY

EC SUSTAINABILITY

The European Community's environmental policy, which recognises the precautionary principle, operates through a framework of action programmes.²⁵ The Fifth Action Programme²⁶ adopted the concept of sustainable development used in the Brundtland report,²⁷ and developed the policy framework for its implementation within the EC. It goes on to say that

the implementation of such a strategy of sustainable development will require a considerable change in almost all major policy areas in which the Community is involved. It requires that environmental protection requirements be integrated into the definition and implementation

17. See Abbott, above n. 2 at 56.

18. OJ L336 23.12.1994, I.

19. Case C-61/94 *Commission v Germany* [1997] 1 CMLR 281.

20. Above n. 10.

21. Although reference is made to international reciprocal agreements under Art. 310 EC (Art. 238 EC, pre-Amsterdam).

22. Article 229 EC, pre-Amsterdam.

23. Case 104/51 *Hauptzollamt Mainz v C.A. Kupferberg & Cie. K.G. a.A.* (reference for a preliminary ruling from the *Bundesfinanzhof*) [1982] ECR 3641.

24. *Ibid.*

25. The First and Second Action Programmes were started in 1972 and 1977 respectively. They concentrated on pollution control. The Third and Fourth Action Programmes, started in 1982 and 1987 respectively, developed an emphasis on prevention, as well as continuing the development of policy on pollution control.

26. 1993 to 2000. Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 February 1993 on a Community programme of policy and action in relation to the environment and sustainable development—a European Community programme of policy and action in relation to the environment and sustainable development. OJ C138 17.5.1993, I.

27. Introduction to the Fifth Action Programme, para. 5.

of other Community policies, not just for the sake of the environment, but also for the sake of the continued efficiency of the other policy areas themselves,²⁸

with the agricultural sector being one of those targeted under Chapter 4.4 of the programme.²⁹ The Sixth Action Programme³⁰ develops the Fifth Action Programme from a cross-sectoral point of view.³¹ In addition to the action programmes,³² sustainability has been written into the EC Treaty at Article 2 EC³³ and Article 6 EC.³⁴

Given that free trade between Member States is one of the more important policies within the EC, and the ultimate target of the WTO, it is interesting to compare the two organisations' approaches to the issue of environmental protection measures hindering or possibly hindering such free movement. The EC position is set out in the *Danish Bottles* case,³⁵ where, in the summary of the judgment, the ECJ stated, at paragraph 1, that

obstacles to free movement within the Community resulting from disparities between the national laws must be accepted in so far as such rules, applicable to domestic and imported products without distinction, may be recognized as being necessary in order to satisfy mandatory requirements recognized by Community law and are proportionate to the aim in view, in so far as they constitute a measure which least restricts the free movement of goods.

The court went on to say that as the protection of the environment was one of the 'Community's essential objectives', and as long as the measures taken were necessary and the 'resulting restrictions' were not 'disproportionate', then the environmental protection measures would be permissible. This is to be contrasted with the WTO Appellate Body's approach in the two *Tuna* cases,³⁶ and in the *Shrimp* case,³⁷ referred to later in this paper.

EC MULTIFUNCTIONALITY

The European Community's views of multifunctionality are still at a policy stage, and have yet to be written into legal texts; however, the concept, along with that of sustainability, is being strongly supported by the EC in light of the current round of WTO agricultural talks.³⁸

28. Chapter 2, third paragraph.

29. The other sectors are industry, energy, transport and tourism.

30. Entitled *Environment 2010: Our Future, our Choice*, COM (2001) 31, which is due to run from 2001 to 2010, available on the Europa website.

31. With a prioritisation on issues such as climate change, nature and biodiversity, environmental and health issues, and natural resources and waste issues.

32. Entered into by the Community pursuant to its remit under the environmental policy provisions of the EC Treaty at Arts. 174 to 176 EC.

33. 'The Community shall have as its task ... to promote throughout the Community a harmonious, balanced and sustainable development of economic activities'.

34. Environmental protection requirements must be integrated into the definition and implementation of Community policies and activities referred to in Art. 3, in particular with a view to promoting sustainable development.

35. Case C-302/86 *Commission v Denmark* [1989] 1 CMLR 619.

36. 30 ILM 1594 (1991) and 33 ILM 839 (1994).

37. *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Report of the Appellate Body*, WT/DS69/AB/R.

38. 'It is essential that the sustainability and multifunctionality principles underpin—and become the norm in—future world agricultural trade negotiations.' Opinion of the Committee of the Regions on: the Proposals for Council Regulations (EC) concerning the reform of the common agricultural policy: Council Regulation (EC) on the financing of the common agricultural policy; 'Council Regulation (EC) amending Regulation (EEC) No. 1766/92 on the common organisation of the market of cereals and repealing Regulation (EEC) No. 2731/75 fixing standard qualities for common wheat, rye, barley, maize and durum wheat; Council Regulation (EC) establishing a support system for producers of certain arable crops'; 'Council Regulation (EC) on the common organisation of the market in beef and veal; Council Regulation (EC) on the common

It is the Agricultural Directorate's view that the issue of multifunctionality in agriculture encompasses the issues of 'safe and high quality goods', the protection of the environment, the saving of 'finite resources', the preservation of rural landscapes,³⁹ and the contribution that agriculture makes to the 'socio-economic development of rural areas including the generation of employment opportunities'.⁴⁰ The European Commission is of the view that the 'multifunctional character of agriculture' is a 'key issue to be addressed in the WTO context'.⁴¹ The EC recognised that agriculture provides 'services' which are 'mainly of a public good character'.⁴² The importance of landscape includes 'stonewalls, terraces, trees and farm woodlands and archaeological features' which contribute to the 'cultural landscape'.⁴³ The specific character of land as a commodity is recognised when the Commission states that unused land does 'not automatically revert to its original wild state', and 'continued usage' in a well-adjusted way is a prerequisite for maintaining its environmental value.⁴⁴

Within the European Community, it is perceived that there is a tendency to 'under-provide' the public service element of agricultural production, as the producers of these services are 'often not or not sufficiently rewarded by the market'.⁴⁵ The requiring of farmers to produce the 'environmental benefits from land use' by virtue of the mere ownership of land could be considered an 'infringement of private property rights', thus necessitating the carrot approach, of encouraging the provision of these services through a reward mechanism.⁴⁶ As stated by the Committee of the Regions, 'farmers must be ready to observe basic environmental standards without compensation'; however, if a 'higher level of environmental service' is being provided, then farmers should be 'remunerated by appropriate agri-environmental measures'.⁴⁷

The philosophy of the EC with regard to the future of agriculture within the EC is reflected in Agenda 2000. Emphasis continues to be put on production; however, the Commission has recognised that this is leading to continuing pressure on landscape and its related biodiversity,⁴⁸ of great importance in the more fragile ecosystem areas. The Commission has recognised that 'a landscape can be regarded as a system comprising a specific geology, land use, natural and built features, flora and fauna, watercourses and climate', to which

organisation of the market in milk and milk products; Council Regulation (EC) amending Regulation (EEC) No. 3950/92 establishing an additional levy in the milk and milk products sector; Council Regulation (EC) establishing common rules for direct support schemes under the common agricultural policy; Council Regulation (EC) on support for rural development from the European Agriculture Guidance and Guarantee Fund (EAGGF), CdR 273/98 fin, OJ C93 06.04.1999, 1.

39. Reference has been made to the European Landscape Convention (adopted by the Council of Europe's Committee of Ministers on 19 July 2000, which was signed on 20 October 2000 by 18 countries during a Ministerial Conference in Florence), by the European Commission, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions On the Sixth Environment Action Programme of the European Community 'Environment 2010: Our future, Our choice' —The Sixth Environment Action Programme COM/2001/31 final.

40. Info-Paper, Agriculture: Process of Analysis and Information Exchange of the WTO; Contribution of the European Community on the Multifunctional Character of Agriculture, October 1999, Europa website.

41. Ibid.

42. Ibid.

43. Ibid.

44. Ibid.

45. Ibid.

46. Ibid.

47. Opinion of the Committee of the Regions on the 'Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on Directions towards sustainable agriculture', OJ C156 6.6.2000, 40.

48. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on Directions towards sustainable agriculture (COM 99/0022).

'should be added habitation patterns and socio-economic factors'.⁴⁹ There is a fear in European agricultural circles that the production model of agriculture will result in the abandonment of the land by large numbers of marginal farmers to the extent that 'scrub and forest encroach and the open landscape will disappear',⁵⁰ which will not be easily recoverable. European environmental policy, for its part, deals with some of the issues of sustainability in agriculture, with its Directives on Habitats and Wild Birds⁵¹ setting up 'special areas of conservation' (SACs) and special protection areas (SPAs) respectively. SPAs were vigorously defended by the ECJ in the case *Commission v Germany (Leybucht Dykes)*,⁵² when it 'made it clear that general economic and recreational interests do not allow for removal or destruction of SPA land'.⁵³ The social issues of underlying agricultural reform are beginning to receive a specific focus within the Agricultural Directorate with the development of a European rural policy.⁵⁴

OECD SUSTAINABILITY

The definition of sustainability commonly used and adopted by the OECD is that of the Brundtland Commission, which defined sustainable development as development that 'meets the needs of the present without compromising the ability of future generations to meet their own needs'.⁵⁵ Sustainability is seen as being 'resource-oriented, long-term and global' in concept.⁵⁶ The OECD, in examining the concept of sustainability in its policy document *Policies to Enhance Sustainable Development*, has noted the propensity for using economic growth as a measure for welfare.⁵⁷ The concept of sustainability is being promoted at a UN level through the Rio Conference,⁵⁸ which approved Agenda 21, the Johannesburg Summit,⁵⁹ and the UN Commission on Sustainable Development. One of the main tools for examining the concept of sustainability is the way, and the extent to which, 'different types of capital can be substituted for each other', with such substitution not always being possible.⁶⁰ It is recognised that certain resources have critical thresholds, and in those circumstances 'more stringent criteria for sustainability will apply'.⁶¹

In designing policies which will be environmentally effective, the OECD has stated that the policies should secure 'regeneration', 'substitutability', 'assimilation' and 'avoid irreversibility'.⁶² In cases where there is a 'lack of scientific certainty', then the precautionary principle should be applied.⁶³ The use of the precautionary principle, however, may cause problems, as different countries appear to take 'different approaches to valuing potential risks involved in the implementation of precaution in practice'. The OECD advocates that its member states should examine the possibilities for ensuring that the application of the principle of 'precaution in environmental policy is more consistent with trade disputes'.⁶⁴ In addition, member state

49. Ibid.

50. Ibid.

51. Council Directive 79/409/EEC on the Conservation of Wild Birds (OJ L103 24.04.79) and Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora (OJ L206, 02.07.1992 7).

52. Case 57/89 *Commission v Germany (Leybucht Dykes)* [1989] ECR 2849.

53. Ibid. But see, now, the Habitats Directive, Art. 6.

54. Under Directorate E of the Agricultural Directorate-general.

55. Policies to Enhance Sustainable Development; OECD 2001, quoting from WECD, World Commission on Environment and Development, *Our Common Future* (Oxford University Press: Oxford, 1987).

56. OECD, *Multifunctionality: Towards an Analytical Framework* (OECD: Paris, 2001).

57. OECD, *Policies to Enhance Sustainable Development* (OECD: Paris, 2001).

58. The Rio Conference on the Environment and Development (UNCED) in 1992.

59. Johannesburg Summit 2002; World Summit on Sustainable Development, 26 August to 4 September 2002, <http://www.johannesburgsummit.org>.

60. See above n. 57.

61. Ibid.

62. Ibid.

63. Ibid.

64. Ibid.

sustainability reviews of policies suffer from an underdeveloped methodology for the measurement of sustainability, which still needs 'to be further strengthened'.⁶⁵

Analytical tools in this area still need to be worked on in order to adequately develop policies.⁶⁶ Tools for the measurement of the 'environmental services provided by natural resources' and different ecosystems, together with the measurement of their threshold points for irreversible damage, still requires further research,⁶⁷ as do 'formal methods for estimating non-market values' of rural amenities, which still lack universal acceptance.⁶⁸ The dichotomy between private goods and public goods is recognised; however, the payment to landowners for the production of non-commodity or public goods, such as 'habitat for wildlife, and sinks for atmospheric carbon', is also problematic. The OECD advocates that payment should only be provided where 'under-supply is a problem', and then only in such a way that does not weaken 'the intrinsic motivation of people to behave in an environmentally responsible manner'.⁶⁹ In addition, issues such as habitat for symbiotic plants and animals, landscape, recreational opportunities and flood control are recognised. The OECD advocates the development of research in order to 'identify low-cost practices that can increase biodiversity without reducing crop and livestock production', with payments being made to farmers for compensation for 'income losses resulting from application of these practices'.⁷⁰

The structuring of current payments to farmers needs to be revisited, as it is recognised by the OECD that 'much of this support leaks to unintended recipients',⁷¹ with current support systems in most OECD countries benefiting 'those producers who are best able to expand their operations'.⁷² The use of the Generalised System of Preferences (GSP) by both the US and the EC for the purpose of 'linking market access to compliance with labour and environmental standards'⁷³ was commented on, with this system being used effectively in many cases to promote sustainable development, and it is seen by the OECD as offering 'some promise for the future'.⁷⁴

MULTIFUNCTIONALITY

Multifunctionality as a concept has been examined by the OECD in its paper 'Multifunctionality: towards an Analytical Framework'.⁷⁵ The OECD is of the opinion that the term multifunctionality 'is not well defined' and is 'prone to different interpretations'.⁷⁶ It identifies two concepts of multifunctionality, the normative concept and the positive concept. The normative concept is to view 'multifunctionality in terms of multiple roles assigned to agriculture', with multifunctionality being 'not merely a characteristic of the production process', but being a 'value in itself', with the maintenance of the 'multifunctional activity' thus being a policy objective in itself.⁷⁷ This approach to multifunctionality is rejected by the OECD as being unacceptable. The approach to multifunctionality adopted and examined by the OECD is what it terms the 'positive' concept of multifunctionality.

65. Ibid.

66. The UK government has been developing sustainability indicators. See <http://www.sustainable-development.gov.uk/indicators/index.htm>.

67. See above n. 57.

68. Ibid. quoting from OECD, *Valuing Rural Amenities* (OECD: Paris, 2001).

69. See above n. 57 at 92.

70. Ibid. at 93, referring to OECD, *Handbook on Incentive Measures for Biodiversity: Design and Implementation* (OECD: Paris, 1999).

71. See above n. 57.

72. Ibid.

73. Ibid.

74. Ibid.

75. See above n. 56.

76. Ibid.

77. Ibid.

The positive concept views multifunctionality as being a 'characteristic of' any economic activity; but it is particularly prevalent in the agricultural and forestry industries. This concept examines the 'multiple, interconnected outputs or effects'. These effects can be either positive or negative, intended or otherwise.⁷⁸ These outputs are classified as commodity and non-commodity outputs. Under this model both land and labour are regarded as inputs, with the 'role of biological processes in production, the close relationship with the environment, and the impact on the rural economy' all being relevant issues.⁷⁹ The non-commodity outputs are deemed to 'exhibit the characteristics of externalities or public goods', a market for which either does not exist, or 'functions poorly'.⁸⁰ An issue arises as to whether the approach should be to develop a market in public goods, or to protect public goods from market exploitation. The OECD asks whether alternative strategies for farming, or the adoption of other technologies, could 'decouple', or alter the degree of 'jointness between commodity and non-commodity outputs', and if a market could be created for the provision of the 'non-commodity outputs', which could operate separately from the existing commodity outputs of farming.⁸¹ The inclusion of issues of 'rural employment and food security' in the OECD discussion on multifunctionality was highly controversial, and the taking into consideration of these issues may again become a problem in WTO discussions on the issue.

It is recognised by the OECD report that multifunctionality may have 'different effects' in countries with different levels of development, but the OECD is of the opinion that its analytical framework should be operable in all countries. The OECD warns that the use of the concept of 'multifunctionality could have domestic or international equity, or income distribution implications',⁸² and that these 'direct and indirect costs of international spillover effects' need to be taken into account when utilising the concept of multifunctionality in designing agricultural policies.⁸³

THE WTO AND THE ENVIRONMENT

While the WTO publicly states on its website that 'commercial interests do NOT take priority over environmental protection',⁸⁴ the WTO, in the same document, equally states that it is 'not the WTO's job to set the international rules for environmental protection'. That is regarded as the task of the environmental agencies and conventions.⁸⁵ The WTO does recognise that it is 'concerned with trade measures applied pursuant to MEAs⁸⁶ which can affect WTO Members' rights and obligations'.⁸⁷ Two problems arise from these statements. One is the relationship between the WTO and existing MEAs, and secondly, the strength of the current provisions on 'sustainable' development within the WTO texts,⁸⁸ and

78. Ibid.

79. Ibid.

80. Ibid.

81. Ibid.

82. Ibid.

83. Ibid.

84. Ten common misunderstandings about the WTO, <http://www.wto.org>.

85. Ibid.

86. Multilateral environmental agreements.

87. Report of the WTO Committee on Trade and the Environment, Press/TE 014, 14 November 1996, <http://www.wto.org>, quoting from PC/SCTE/W/3, 12 October 1994.

88. Such as the Report of the WTO Committee on Trade and the Environment, Press/TE 014, 14 November 1996, <http://www.wto.org>, quoting from the Decision of 14 April 1994, Ministers meeting on the occasion of signing the Final Act embodying the results of the Uruguay Round of Multilateral Trade negotiations at Marrakech on 5 April 1994, which provides 'allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the

any future provisions on multifunctionality. The WTO's Committee on Trade and Environment (CTE) differs from other WTO committees in that it does not 'administer a formal WTO agreement'.⁸⁹ The CTE is of the opinion that the WTO is 'not the forum to decide upon the appropriateness of environmental criteria' and that its most controversial policy issue is that of eco-labelling,⁹⁰ within the parameters of the Technical Barriers to Trade (TBT) Agreement,⁹¹ and the examination of the extent to which eco-labelling is 'trade distorting'.⁹² The possibility of the development of a legal concept of sustainability, and the newer, and less developed concept of multifunctionality, at a WTO level, in line with the Doha agenda that 'sustainable development should be the overarching goal' of the current negotiations,⁹³ within the current parameters of the WTO documentation and case law, would appear therefore to be somewhat stifled.

The WTO's prevailing fear is that 'protectionary measures' are enacted in 'the guise of environmental measures', leading to 'green protectionism'.⁹⁴ While the treaty provisions appear to give a clear legal environmental protection, this protection, when relied upon at dispute settlement stage, currently appears to lack rigour. Both the Agreement on Agriculture and the Subsidies and Countervailing Measures currently provide exemptions for environmental subsidies; however, these may prove to be too limited to encompass the holistic approach needed to properly adopt the sustainability and multifunctionality criteria, particularly if the precautionary principle is to be adopted, as advocated by the OECD.

The Agreement on Agriculture provides that 'environmental subsidies may be exempt from commitments to reduce domestic support when certain conditions are met'.⁹⁵ The Subsidies and Countervailing Measures provides similar provisions. These subsidies, if applied within the parameters of the relevant agreement, are exempt from the WTO's dispute settlement procedure.⁹⁶ Article XX of the GATT permits 'countries to take actions to protect human, animal or plant life or health, and to conserve exhaustible natural resources'.⁹⁷ This provision proved to be less robust than would first appear in the *Tuna Dolphin* case.⁹⁸ While the report of the dispute settlement panel was not adopted into 'GATT law' by the GATT Council, its report can be held 'persuasive before subsequent dispute settlement panels'.⁹⁹ The panel in this case held, unsurprisingly, that the import restrictions contravened Article XI. The issue arose as to whether exemptions could be claimed under either Article XX(b)¹⁰⁰ or

environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development'. In addition, the preamble of the WTO Agreement refers to the objective of sustainable development, and to the 'need to protect and preserve the environment, in a manner consistent with countries' needs and levels of economic development'. The Doha agenda states that sustainable development should be an overarching goal of the negotiations.

89. Environment: Trade and Environment News Bulletins, TE/019—July 1997, <http://www.wto.org>.

90. Environment: CTE Agenda Part 3, CTE on how environmental taxes and other requirements fit in, <http://www.wto.org>.

91. Ibid.

92. Above n. 89.

93. J. Clarke, 'WTO: Now the Hard Work Really Begins', (2002) 8(2) INTTLR 39–52.

94. H. Ward, 'Trade and the Environment in the Round—and after' (1994) 6(2) *Journal of Environmental Law*.

95. Environment: CTE Agenda Part 2, CTE on environmental protection and the trading system, <http://www.wto.org>.

96. Ibid.

97. See above n. 84.

98. (1991) ILM 1594.

99. See above n. 94.

100. Article XX(b) provides that measures which are 'not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination where the same conditions prevail, or a disguised restriction on international trade' and which are 'necessary to protect human, animal or plant life or health' are exempt.

(g)¹⁰¹ exceptions. Controversially, the panel held that neither the protection of life or health (Article XX(b)) nor exhaustible natural resources (Article XX(g)) could be relied on. In addition, an 'extrajurisdictional interpretation' of Article XX(g) was not permitted.¹⁰²

The Appellate Body in the second *Tuna* case¹⁰³ found that 'parties are entitled to protect an environmental resource situated beyond its territorial jurisdiction'.¹⁰⁴ The second *Tuna* case found that, in order to rely on the provisions of Article XX exemptions, it was necessary for there to be a 'direct causal connection between the measure and the environmental objective pursued'.¹⁰⁵ This is a very limited view of environmental protection, and is not compatible with a holistic approach which would be required in order to further the promotion of sustainable practices. Scott is of the view that the *Tuna II* findings would only lead to environmental protection in the event of 'drifting pollution' emanating from one member state 'spilling over physically to the territory of the regulating state'.¹⁰⁶ The two *Tuna* cases both point to very limited circumstances when the Article XX exemptions could be relied on in order to pursue environmental objectives.

In the more recent *Shrimp* case¹⁰⁷ US environmental protection measures again failed to meet the Article XX environmental protection exemption test. This time the US legislation was held to fail WTO tests, in the view of the panel, on the basis that there was 'unjustifiable discrimination between countries where the same conditions prevail'.¹⁰⁸ The Appellate Body also attached 'considerable importance to the failure of the United States' to follow the correct procedures, to include 'across-the-board negotiations' with all the relevant parties before 'enforcing the import prohibition'.¹⁰⁹ It would appear that international meaningful negotiation between all relevant countries is required before environmental protection measures will be permitted under the Article XX provisions. The legal relationship between the WTO and MEAs therefore becomes relevant.

The legal status of WTO-MEA relationships has also been causing concern among WTO member states,¹¹⁰ which are concerned not to 'undermine environmental negotiations'. The WTO sees MEAs as being 'the best way of co-ordinating policy action to tackle global and transboundary environmental problems co-operatively'.¹¹¹ While only approximately 20 out of the 200 MEAs currently in force contain trade provisions,¹¹² it is recognised that 'MEAs and the WTO both represent different bodies of international law',¹¹³ and that conflicts could

101. Article XX(g) provides the measures which are 'not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination where the same conditions prevail, or a disguised restriction on international trade' and which relate to 'the conservation of exhaustible natural resources if ... made effective in conjunction with restrictions on domestic production or consumption'.

102. See above n. 90.

103. *Tuna/Dolphin II*, (1994) 33 ILM 839.

104. J. Scott, 'On Kith and Kine (and Crustaceans): Trade and Environment in the EU and the WTO' in J.J. H. Weiler (ed.), *The EU, the WTO and the NAFTA* (Oxford University Press: Oxford, 2000).

105. Ibid.

106. Ibid.

107. *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Report of the Appellate Body*, WT/DS69/AB/R.

108. See above n. 104.

109. Ibid.

110. Environment: Trade and Environment News Bulletins, TE/036—6 July 2001, Committee on Trade and the Environment's (CTE) meeting on 27–28 June 2001, <http://www.wto.org>.

111. Report of the WTO Committee on Trade and the Environment, Press/TE 014, 14 November 1996, <http://www.wto.org>.

112. Environment: CTE Agenda Part 1, CTE on trade rules, environmental agreements and disputes, and PC/SCTE/W/3, 12 October 1994, <http://www.wto.org>.

113. See above n. 111.

arise in the future, given that MEAs as currently drafted 'violate the principles of non-discrimination', breaching the 'most-favoured-nation clause' permitting trade with some countries but not with others, and violate the national treatment provisions by 'allowing discrimination between domestic and imported products'.¹¹⁴ In addition, a principle of international law, *lex specialis*, throws a spanner in the works for the WTO. *Lex specialis* provides that 'if all parties to a treaty conclude a more specialised treaty, the provisions of the latter prevail over those of the former'.¹¹⁵ It is therefore highly conceivable that an MEA, under this principle, would prevail over the WTO agreements. This, according to the WTO website, is a 'widely held view in the CTE'.¹¹⁶ A concern to the CTE is the trade discrimination effects against WTO members who have not signed up to a particular MEA.¹¹⁷

Waiver provisions are provided for in Article IX of the WTO, which could possibly be used for the purpose of MEA obligation recognition. These waivers are provided for, however, only in exceptional circumstances, and are 'subject to approval at a minimum by three-quarters of the WTO membership'.¹¹⁸ The waivers are also time limited. One proposal is to provide for 'multi-year' waivers for the purpose of providing for 'trade measures applied pursuant to MEAs', with such waivers being permitted only if they 'meet specified criteria',¹¹⁹ presumably being minimally trade distorting. This whole area of the 'compatibility between good trade and environmental policies' has yet to be fully explored at a WTO level,¹²⁰ and presumably will become an issue at the Doha ministerial.

THE GREEN AND BLUE BOXES

The Agreement on Agriculture provides for exemptions under the green box provisions,¹²¹ and exclusions under the blue box provisions.¹²² The green box provisions permit¹²³ 'payments under environmental and regional assistance programmes'.¹²⁴ Payments under green box provisions must be generally available to producers within the region¹²⁵ and cannot be 'related to, or based on, the type or volume of production',¹²⁶ with the 'size of the payment related to the income loss incurred' and not current behaviour,¹²⁷ thereby limiting the effectiveness of developing green box payments as steering mechanisms in the development of more sustainable agricultural practices.¹²⁸ In addition, Rude has pointed out that the taxing of 'negative environmental externalities' is possible under the Agreement on Agriculture, but the provision of 'subsidies to encourage the generation of positive environmental externalities would be a problem' within the parameters of the green box provisions.¹²⁹

114. Environment: CTE Agenda Part 1, CTE on trade rules, environmental agreements and disputes, <http://www.wto.org>.

115. Ibid.

116. Ibid.

117. Ibid.

118. Ibid.

119. Ibid.

120. Environment: CTE Agenda Part 5, CTE on environmental and trade liberalisation, <http://www.wto.org>.

121. Article 6.1 of the Agreement on Agriculture and Annex 2.

122. Article 6 Agreement on Agriculture.

123. Agreement on Agriculture, Arts. 2.2–2.13.

124. K.C. Kennedy, 'Reforming Farm Trade in the Next Round of WTO Multilateral Trade Negotiations' (2001) 35(6) *Journal of World Trade* 1061–79.

125. J. Rude, 'Under the Green Box: the WTO and Farm Subsidies' (2001) 35(5) *Journal of World Trade* 1015–33.

126. WTO Agreement on Agriculture, Annex 2, para. 6.

127. See above n. 125.

128. Ibid.

129. Ibid.

Blue box payments¹³⁰ permit payments aimed at certain 'limited agricultural production',¹³¹ but again they do not permit steering mechanisms aimed at encouraging sustainable farming practices. Safety net provisions¹³² again 'shall relate solely to income; [they] shall not relate to the type or volume of production'.¹³³ Payments under environmental programmes are allowed, provided they are part of 'a clearly defined government environmental or conservation programme and dependent on the fulfilment of specific conditions';¹³⁴ however, the payments 'cannot exceed the extra costs of complying with the government programme', thereby limiting the attractiveness of such programmes to producers.¹³⁵ Equally the special safeguards provision in the Agreement on Agriculture does not provide the necessary mechanism for developing either the principles of sustainability or multifunctionality, as it can only be invoked if 'the volume of imports of the concerned product in any year exceeds a certain trigger level or, but not concurrently, the import price falls below a certain trigger price'.¹³⁶

DOHA AND BEYOND

The WTO agricultural negotiations reopened in early 2000, under Article 20 of the WTO Agricultural Agreement. The Doha ministerial is ongoing. The WTO Agricultural Committee agreed on 26 March 2002 to 'a work programme which would set out by 31 March 2003 the key negotiating principles for a final comprehensive farm deal',¹³⁷ with the date of 1 January 2005 being set as the deadline for 'reaching a final agreement on agriculture and all other areas of negotiations that comprise the Doha Development Agenda'. While the current focus is on the 'substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support', it will also include 'some rule making'. In the discussions, 'non-trade concerns will be taken into account'. How the issues of the non-trade concerns of sustainability and multifunctionality 'will be taken into account' remains to be established, and will be dependent on the dynamics of the negotiating table. It is hoped that this paper sheds some light on legal and policy thinking on these issues. The internationally recognised definition of sustainability of the Brundtland Commission has been adopted by both the OECD and the EC, and has been written into various policy documents. There is a fear of a lack of robustness of existing environmental measures at the WTO level, in light of the Appellate Body's jurisprudence in the two *Tuna* cases and the *Shrimp* cases. The issue arises of how, given the possibly weak adoption of the principle of 'sustainability' as a general environmental principle, the WTO will be able to address the issue of 'multifunctionality' in the policy area of agriculture. Should the WTO, during the current round of negotiations, fail to grasp the nettle of 'multifunctionality' in a tangible way, how will this failure affect the EC Common Agricultural Policy and the evolving European rural policy, given the legal articulation between the EC and the WTO discussed earlier? If this scenario arises, what is the likelihood of the EC engaging in future WTO trading disputes with its global trading partners over agricultural products? We will have to wait and see. Interesting times may lie ahead, not only for European and global agricultural lawyers, but also for the farmers of western Europe.

130. Under Annex 2, Art. 6.

131. See above n. 124.

132. WTO Agreement on Agriculture, Annex 2, para. 7.

133. See above n. 125.

134. Ibid.

135. Ibid.

136. J.S. Mah, 'Reflections on the Special Safeguard Provision on the Agreement on Agriculture of the WTO' (1999) 33(5) *Journal of World Trade* 197-204.

137. 'WTO members set schedule to meet 12-month "modalities" deadline', Press Release, Press/282, 27 March 2002, <http://www.wto.org>.